

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON

ROGER DEAN GILLISPIE,

Plaintiff,

CASE NO. 3:13-cv-416-TMR

-VS-

THE CITY OF MIAMI TOWNSHIP, ET AL.,) JURY TRIAL

Defendants.

VOLUME IX

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE **THOMAS M. ROSE**,
UNITED STATES DISTRICT JUDGE, PRESIDING
WEDNESDAY, NOVEMBER 17, 2022
DAYTON, OH

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Also Present: Roger Dean Gillispie, plaintiff; Valerie Barajas, paralegal; Matt Thibodeau, paralegal; Jeff Weber, IT

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INDEX OF WITNESSES

PLAINTIFF'S WITNESSES

TIMMY WILSON (READ INTO RECORD) 1369

PLAINTIFF RESTS 1384

DEFENSE WITNESSES

ANTHONY MONHEIM

Direct Examination by Mr. McLandrich 1386

Cross-Examination by Mr. Owens 1403

Cross-Examination by Ms. Frick 1424

Redirect Examination by Mr. McLandrich 1426

Recross-Examination by Mr. Owens 1429

JOHN WIXTED

Direct Examination by Mr. McLandrich 1432

Cross-Examination by Mr. Owens 1464

Redirect Examination by Mr. McLandrich 1491

Recross-Examination by Mr. Owens 1497

DEFENDANT MOORE RESTS 1501

* * * * *

1	INDEX OF EXHIBITS	
	PLAINTIFF'S	ADMITTED
2	54	1507
	56, 58	1531
3	64, 76, 104	1510
	138 (pg 4)	1513
4	176 (pgs. 8, 9)	1514
	177 (pgs. 19, 20, 25, 27)	1513
5	200 (pgs. 1, 3, 4, 5, 6)	1514
	205 (pgs. 3, 6), 213, 215 (pgs. 1, 2)	1515
6	247, 249 (pg. 1), 252 (pg. 1),	
	281 (pgs. 1, 2), 282, 284 (pgs. 2, 5, 6, 8),	
7	285 (pgs. 6, 7, 9, 10)	1517
8	DEFENSE'S	
9	1 (pgs. 1-4), 2 (pgs. 1-14), 3 (pgs. 1-13),	
	4, 5, 6 (pgs. 1, 2), 7 (pgs. 1, 2),	
10	8 (pgs. 1-10), 9 (pgs. 1-4), 10 (pgs. 1 and 2)	1526
	11 (pg. 1), 12 (pg. 1), 13 (pgs. 1, 2),	
11	14 (pg. 1), 15 (pg. 1, 2), 17 (pg. 1),	
	18 (pgs. 1-3), 19 (pgs. 1-3), 22 (pgs. 1-3),	
12	28 (pgs. 1-18), 31 (pgs. 1, 2),	1527
	23	1543
13	32 (pgs. 1, 2), 33 (pgs. 1, 2)	1530

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1 P-R-O-C-E-E-D-I-N-G-S 9:28 A.M.

2 (In open court at 9:28 a.m.)

3 THE COURT: Ladies and gentlemen, good morning.
4 Hopefully you had a good evening. Hopefully you didn't get
5 stuck in the snow. And hopefully you were able to abide by
6 the Court's admonitions. I assume you all were? Anybody that
7 wasn't?

8 (No verbal response.)

9 THE COURT: Ladies and gentlemen, before we go -- we
10 start our presentation of evidence, I just want to again
11 remind you that we are probably to the point of the trial in
12 which we may, on occasion, take extended breaks in order for
13 the Court to deal with matters outside your presence. Please
14 be patient. Please don't try to put any specific reason on
15 that. That's something that the Court has to do. That's not
16 the fault of any party. That's just the fact that the Court
17 has to make those decisions. So we may, on occasion, take
18 breaks. Breaks may be longer than usual, and there may be
19 more of them. I am not saying there will be, I'm just
20 preparing you in case there are. So, again, I would just ask
21 you to be patient and bear with us.

22 All right. We are on the record. Counsel ready to
23 proceed?

24 MR. OWENS: We are, Your Honor.

25 MR. McLANDRICH: Yes, sir, Your Honor.

1 MR. HERMAN: Yes, Your Honor.

2 THE COURT: Ladies and gentlemen, again, I am going
3 to apprise you of the fact that -- well, first witness?

4 MR. OWENS: Your Honor, we've got the deposition of
5 Sergeant Tim Wilson.

6 THE COURT: Ladies and gentlemen, as I indicated to
7 you yesterday and I instructed you on it yesterday, a
8 deposition is a witness's sworn statement that is taken before
9 the trial, and during that deposition the witness is under
10 oath and swears to tell the truth. And the lawyers for each
11 party may ask questions. A court reporter is present, and
12 records -- records the questions and answer.

13 And as I indicated, this is a -- these are designations
14 of a deposition that was taken of one Tim L. Wilson on
15 December the 18th, 2018. This deposition testimony, or these
16 designations -- when I mean "designations," I mean parts of
17 the deposition that the -- that the Court has -- is allowing
18 to be presented to you. That testimony, those designations,
19 are entitled to the same consideration as any live testimony
20 that you might hear and consider, and you must judge it in the
21 same way as if the witness was testifying here in court.

22 And, again, we will have folks playing the part of
23 Mr. Wilson, and counsel will be asking questions. Please
24 don't put any significance on the behavior or the tone of
25 voice of the people who are reading the deposition.

WILSON - (READ INTO RECORD)

1370

1 Any questions?

2 (No verbal response.)

3 THE COURT: You may proceed.

4 You may inquire.

5 **TIMMY LEE WILSON, PLAINTIFF'S WITNESS, READ AS FOLLOWS:**

6 MS. PORTER: Tim L. Wilson was called as a witness,
7 and having first been duly sworn, testifies as following.

8 **EXAMINATION**

9 BY MS. PORTER:

10 **Q.** Good morning, sir.

11 **A.** Good morning.

12 **Q.** Would you please state and spell your name for the
13 record?

14 **A.** Tim Lee Wilson. W-I-L-S-O-N is the last name. Timmy,
15 T-I-M-M-Y. Middle name Lee, L-E-E.

16 **Q.** Was there anything that you read in Mr. Moore's
17 deposition that you can recall that conflicted with your
18 memory of how things worked in Miami Township during the
19 period of time in which the C.W. and B.W.'s rapes were being
20 investigated?

21 **A.** It seemed pretty much accurate.

22 **Q.** So what happened in June of 1990?

23 **A.** I believe it was right on my birthday, June 15th of
24 1990, I received a call from Captain Scothorn of the Miami
25 Township Police Department asking if I was interested in a

WILSON - (READ INTO RECORD)

1371

1 detective-sergeant's position at the police department. We
2 entered into negotiations, and right around that date I was
3 hired to go to Miami Township Police Department as a
4 detective-sergeant.

5 Q. Okay. Tell me first about what your duties were from the
6 internal affairs side of things.

7 A. I would be assigned a case generally from Captain
8 Scothorn or Chief Tom Angel concerning any kind of
9 allegations against any of our officers, misconduct,
10 criminal cases, civil -- not civil -- but internal cases,
11 and I would investigate them and report back to the captain.

12 Q. Were there any written general orders or special orders
13 governing how internal affairs' investigations worked in 1989?

14 A. 1990.

15 Q. Excuse me. Yeah, June of 1990, got it.

16 A. We had a standard operating procedure book, pamphlet.

17 Q. And were you, as the internal affairs supervisor, did you
18 have somebody below you who did the investigation, or did you
19 do the investigation yourself?

20 A. I did.

21 Q. And then would you report that up the chair to the
22 captain and the chief?

23 A. Yes.

24 Q. Did you ever overlap with Steve Fritz in the department?

25 A. No.

WILSON - (READ INTO RECORD)

1372

1 Q. Okay. And now, what were your duties in relationship to
2 supervising these detectives when they were working on ongoing
3 investigations?

4 A. When they are working on on -- in ongoing
5 investigation?

6 Q. Yes, sir.

7 A. As I said, first of all, I consider myself not a
8 micromanager. I didn't look over their shoulder constantly.
9 They were all fairly experienced officers promoted in the
10 detective section. They had all, I believe, handled some
11 pretty significant cases in the past.

12 My daily duties were just to observe, to be there
13 for them. If they needed assistance or they needed help on
14 a case, I would assign additional help to them, ensure that
15 their case -- cases was wrapped up, so to say, presented to
16 the prosecutor's office, you know, and as timely as could
17 be; to assist them if they requested any assistance for
18 search warrants. Just generally being there, being there
19 for them, assigning cases to them. If they submitted
20 reports, I'd review the reports, document the reports to
21 records or whoever.

22 THE COURT: Mr. Wilson, can you slow down a little.

23 THE WITNESS: Sure.

24 BY MS. PORTER:

25 Q. What was that process like? And at the time, I just want

WILSON - (READ INTO RECORD)

1373

1 to be really clear so that we are on the same page. I'm
2 talking about between June of 1990, for about a year or year
3 and a half after, until the beginning of 1992.

4 **A.** If I recall, that was about the time period they
5 switched from handwritten reports to computerized
6 generalized -- computerized generized reports. The
7 detectives would open up the main case file or case report
8 in the computer that they had been assigned, and they would
9 do a supplemental report as the investigation was ongoing.
10 And they would either -- once finished with the supplemental
11 report, they would either or both save it in the computer
12 and/or print it out if they were pretty much finished with
13 it.

14 Once I received a printed copy of that report, I'd look
15 at it, review it, make suggestions, sometimes talk to
16 detectives about it if need be, sometimes not, and generate
17 or send that report to the records section for filing.

18 **Q.** And when the reports were computerized, the case reports,
19 would you review them along the way or just at the end of the
20 investigation?

21 **A.** Generally at the end. Not generally. Mostly at the
22 end.

23 **Q.** Fair to say that when a detective at Miami Township
24 Police Department submitted a report in 1990 or 1991, that it
25 had to be reviewed by some sergeant or supervisor?

WILSON - (READ INTO RECORD)

1374

1 A. When they printed it out, when they were finished with
2 their summaries or finished with the investigation and it
3 crossed our desk, yes.

4 Q. I guess what I'm wondering is, as a matter of policy and
5 practice at the time, did detectives have to submit every
6 report to a supervisor?

7 A. I would say yes.

8 Q. Do you know if it was a Polaroid?

9 A. I do not recall.

10 Q. Did you directly oversee Scott Moore in his preparation
11 of any photographic lineups?

12 A. No. What I do recall is the officer, the detectives
13 constructing the photo lineup from a multitude of available
14 photographs or mugshots at the police department. That was
15 the primary source of the photograph. They would arrange an
16 array, sometimes, if I recall, six, maybe eight
17 photographs -- I'm sure nothing less than six, probably no
18 more than eight -- from one suspect on one incident. They
19 would concentrate on having photographs of the suspect being
20 like and similar. They would pay special interest obviously
21 to race, to the physical structure, facial hair structure.
22 Just try to get photographs of somebody that's as close as
23 they can to the suspect, put it in an organized chart or
24 bundle, and present it separately to the victim or victims
25 individually.

WILSON - (READ INTO RECORD)

1375

1 They may have them -- without trying to prejudice the
2 identification that might be made by the victim, they would
3 not refer to names and that type of thing. They would just
4 simply say, "Look at it. Do you see somebody that looks
5 familiar that may have assaulted," or whatever the case may
6 be. If they identified that person, they may have the
7 victim sign their name on that particular photograph, date
8 it and time, and present the information to the prosecutor's
9 office somewhere along the line.

10 **Q.** Now, you mentioned a couple minutes ago that there was
11 some kind of photograph, a photo database that is used --
12 excuse me. Strike that. You mentioned a moment ago that
13 there was photo -- photo databases that detectives could use
14 to generate the photo arrays. Do you recall that?

15 **A.** Yes.

16 **Q.** And what were those photo databases that were available
17 in 1990 and 1991?

18 **A.** During that period of time, the best I can recall, was
19 just a photo album-type things. Mugshot books that we
20 housed in the detective section from people who have been
21 arrested in the past or what we called a field
22 interrogation, somebody that's acting suspicious, there was
23 reason for us to be there, for the patrol officer to be
24 there.

25 The patrol officer may take a Polaroid and do what was

WILSON - (READ INTO RECORD)

1376

1 called a memo card, just a brief card saying that on such a
2 date I saw John Doe. John Doe was acting suspicious, had no
3 identification, we took a photograph.

4 Q. Are you aware of any time that you were included in a
5 photographic lineup?

6 A. I don't remember being involved.

7 Q. Would you be surprised to find out that you were included
8 in a photographic lineup?

9 A. No, because I've heard that I was in this photo lineup.
10 I wouldn't be surprised today. But when I learned that,
11 yes, I was surprised.

12 Q. Okay. Now, I just want to be really clear about the way
13 in which your supervision of Detective Moore would have worked
14 in 1990. And for the photographic lineup, it would have been
15 consistent with the practices of the department as you
16 understood them for him to create the lineup without showing
17 it to you before he showed it to the victims, correct?

18 A. Would it be consistent?

19 Q. Was it the practices of the department for Detective
20 Moore to have made the lineup and then shown it to the victims
21 without having any other officer review it?

22 A. Yes.

23 In 1990, it would not have violated any practice or
24 rule of the department for Detective Moore to include police
25 officers --

WILSON - (READ INTO RECORD)

1377

1 MR. KANOVITZ: I'm sorry. I think that's you.

2 Q. In 1990, it would not have violated any practice or rule
3 of the department for Detective Moore to include police
4 officers in the photographic lineup, correct?

5 A. Yes.

6 Q. And are you aware of any circumstances in which Miami
7 Township detectives used the Miami Valley Regional Crime Lab
8 to create pictures to be used in a photographic lineup?

9 A. Am I aware?

10 Q. Yes.

11 A. I am not.

12 Q. Is that something you've ever specifically recalled
13 approving?

14 A. I never did.

15 Q. So did you have any impressions of Scott Moore as a
16 detective?

17 A. Yes.

18 Q. What was that?

19 A. Scott Moore as a detective. My impression would be
20 that he was a very thorough investigator. He was
21 knowledgeable. He was probably above average as an
22 investigator. He was, I've often said, the type of
23 investigator that if you wrote a bad check on or committed a
24 forgery, because that was his main responsibilities that I
25 would assign him to, if you wrote a bad check, you wouldn't

WILSON - (READ INTO RECORD)

1378

1 want him on your tail. He would track you down.

2 Q. I was just trying to understand the perspective. I
3 thought your testimony was that you were proud of him because
4 he was able to get convictions, not once, but twice, in this
5 case, correct?

6 A. I think yes would be the answer. Certainly, any time
7 you have a major case investigation like that where you got
8 multiple victims that's been harmed and you investigate and
9 you present it to the prosecutor's office and they accept
10 your investigation and they present it to a jury and you get
11 a conviction once, an appeal, and you get the conviction
12 again, yes, it's something to be proud of and should be
13 recognized by the police department.

14 Q. It sounds like Captain Scothorn gave you sort of a run-
15 down, the backstory of all of the guys that you were
16 supervising; is that fair to say?

17 A. Quite a few of them, yes.

18 Q. Anything else you can recall about what Captain Scothorn
19 told you about -- told you when you were initially starting as
20 it relates to Mr. Moore?

21 A. Yes.

22 Q. What is that?

23 A. Well, in general conversation, he told me things like,
24 "You know Scott Moore is Jim Moore's son. Jim Moore was the
25 previous police chief."

WILSON - (READ INTO RECORD)

1379

1 And I said, "Yes."

2 And it was implicated that Chief Angel kind of owed a
3 little bit of allegiance to Chief Moore for getting Tom
4 Angel the job as police chief. So it was kind of thought
5 that the chief would go an extra step for Scott Moore.

6 **Q.** All right. Is it fair to say that Scott Moore had more
7 leeway as a young detective in the department because his
8 father was the former chief?

9 **A.** There was that appearance.

10 **Q.** Now, I understand your testimony today is that you didn't
11 directly supervise Mr. Moore on the C.W., B.W. case, and you
12 learned about it sometime after you first arrived at the
13 department, right? Basically?

14 **A.** Yes.

15 **Q.** And what I'm wondering is did you ever read the initial
16 case reports, the handwritten one, for the B.W., C.W. case?

17 **A.** No.

18 **Q.** All right. Now, do you see this mentioned, yourself
19 being present for the arrest of Mr. Gillispie?

20 **A.** I see it.

21 **Q.** Does this refresh your recollection one way or the other
22 about whether or not you were present for that?

23 **A.** I do not recall. Don't think it ever happened.

24 **Q.** Why don't you think it ever happened?

25 **A.** I don't remember it.

WILSON - (READ INTO RECORD)

1380

1 Q. Would it be typical practice for you as a sergeant in
2 Miami Township Police Department in 1990 to go out and
3 effectuate arrests with the detectives?

4 A. No.

5 Q. And why not?

6 A. My understanding from my supervisor, Captain Scothorn,
7 his thinking was supervisors supervise, detectives go out in
8 the field and detect. That was contrary to what I had done
9 at other departments. Plus, we had fewer people at the
10 other department. So as a detective-sergeant, I was also
11 out in the field a lot more.

12 In Miami Township, it was expected to let the field
13 detectives go out and do their investigations, and if they
14 needed assistance, ask for it and I would go. Or if I saw
15 something that I thought needed my attention, I would do.

16 Q. Okay. And so you did not go with Scott Moore to arrest
17 Dean Gillispie; is that correct?

18 A. I did not.

19 Q. Let me show you, sir, what has previously been marked as
20 Exhibit 21. Are you familiar with this form? Without the
21 details being filled in, just the form of the document.

22 A. I've seen similar writings like this, a similar form,
23 yes.

24 Q. Is this a standard form that the Miami Township Police
25 Department used in 1990?

WILSON - (READ INTO RECORD)

1381

1 **A.** "Standard" would be the key word. And I do not think
2 it would be a standard form.

3 **Q.** Okay. Now, do you see the bottom two lines that happen
4 to be highlighted in yellow?

5 **A.** Yes, I do.

6 **Q.** Would those be part of the typical form, or is that
7 something that would have been added in this particular
8 instance?

9 **A.** I do not remember this being standard procedure with
10 the wording as it is worded now.

11 **Q.** And what do you mean by that?

12 **A.** Well, I don't believe that -- I have to concentrate or
13 I have to express that during financial crimes is where I
14 saw this type of letter. And I do not remember seeing
15 failure to -- quote, "failure to appear will result in a
16 warrant being issued for your arrest," unquote, because we
17 don't know if we could legally arrest that person or if that
18 person was actually the person that may have done a
19 financial crime. But it was -- it was not out of routine to
20 send a letter to someone saying we have -- we're
21 investigating a financial crime. Come to the police
22 department.

23 **Q.** Right. It wouldn't be out of routine to send a letter
24 asking someone to come to the police department -- come to the
25 police department like this one. It would have been out of

WILSON - (READ INTO RECORD)

1382

1 routine to include the last two lines; is that fair to say?

2 A. It was not routine in my opinion.

3 Q. Can you think of any other time that you have seen these
4 last two letters with these last two lines that are -- seen
5 these two letters with these last two lines that are
6 highlighted in yellow on this one?

7 A. No.

8 Q. Do you have any -- do you have any conversations with
9 Scott Moore that you can recall about his decision to pursue
10 Gillispie or arrest him?

11 A. No.

12 Q. Did you ever supervise Scott Moore in any way as it
13 relates to the things that he did or did not turn over to the
14 prosecutors or criminal defense?

15 A. Personally supervise? No.

16 Q. Did you have any conversations with Scott Moore about
17 that topic?

18 A. Not that I recall.

19 Q. All right. And then I don't recall, and I may not
20 understand, would you at least -- when the report was
21 completed, is that something you would have at least reviewed,
22 do you know, or would that have gone to somebody else within
23 the department?

24 A. On that particular case, it very well could have went
25 to somebody else that was assigned the case. Higher

WILSON - (READ INTO RECORD)

1383

1 authority than me that assigned the case to Moore.

2 Q. So as you sit here today, is it possible you may have
3 reviewed that and simply don't recall, or are you sure that
4 you did not review the final report before it would have gone
5 to the prosecutor's office?

6 A. I may have reviewed it, but I don't remember reviewing
7 it.

8 Q. All right. Now, in the complaint there is an allegation
9 that Moore withheld and destroyed evidence, unlawfully
10 undermined Mr. Gillispie's defense, provided false and
11 misleading testimony.

12 All right. First of all, if, in fact, that were to
13 occur, that evidence was being withheld, destroyed, or
14 providing false testimony, those actions themselves would, in
15 fact, be criminal acts, would they not?

16 A. They would be criminal as far as I know, sir.

17 Q. And, in fact, as a law enforcement officer, when you are
18 sworn as an officer, you take an oath that you are going to
19 uphold the Constitution of the United States, federal laws,
20 the Constitution of the State of Ohio, state laws, and all
21 local ordinances and laws, correct?

22 A. Yes, sir.

23 Q. All right. And any officer who would knowingly or
24 intentionally either withhold or destroy evidence or
25 unlawfully undermine a suspect's defense or commit perjury or

WILSON - (READ INTO RECORD)

1384

1 provide false testimony would be acting contrary to the oath
2 that they took when they became a police officer; is that fair
3 to say?

4 A. It is, sir.

5 Q. And did you have any knowledge of any other officers in
6 the Miami Township Police Department removing supplemental
7 reports authored by Bailey or Fritz?

8 A. I do not have any knowledge, sir.

9 Q. And if I mischaracterize anything, please let me know,
10 but my understanding from your testimony was that you
11 basically expected your detectives to basically provide
12 everything to the prosecutor's office, correct?

13 A. It was mandatory, yes, sir.

14 Q. All right. And that was, in fact, during the time period
15 you were there the custom and practice of the Miami Township
16 Police Department, was it not?

17 A. It was, sir.

18 Q. So would you say that everyone knew that they had an
19 obligation to turn over the good, the bad, the ugly to the
20 prosecutors, right?

21 A. As detectives, yes.

22 Q. And that was the expectation that you had for your
23 officers, correct?

24 A. Exactly.

25 Q. But at the same time, you didn't take any steps to figure

WILSON - (READ INTO RECORD)

1385

1 out whether or not that was happening or monitor what they
2 did, correct?

3 A. I didn't think I had to babysit them, no.

4 THE COURT: All right. Thank you.

5 Counsel approach.

6 (At sidebar off the record.)

7 THE COURT: Counsel approach.

8 (At sidebar off the record.)

9 THE COURT: We're back on the record.

10 Counsel.

11 MR. OWENS: Your Honor, subject to the admission and
12 entry of the exhibits that have been offered, at this time the
13 plaintiff will rest our case.

14 THE COURT: Thank you.

15 **PLAINTIFF RESTS**

16 Is defendant ready to proceed?

17 MR. McLANDRICH: Yes, sir.

18 THE COURT: All right. You may proceed. First
19 witness.

20 MR. McLANDRICH: Defendants call Anthony Monheim.

21 **ANTHONY MONHEIM, DEFENDANT MOORE'S WITNESS, SWORN**

22 THE COURT: Mr. Monheim, please keep your voice up
23 so that we can all hear the responses to any questions that
24 may be posed. You have a microphone there in front of you
25 which can be of assistance to you. If it gets too close, it

1 muffles; if it gets too far away, it doesn't pick you up. So
2 I recommend to all witnesses that one way to solve that
3 problem is keep your voice up so we can hear your responses.
4 All right?

5 THE WITNESS: Yes, sir.

6 THE COURT: You may inquire.

7 MR. McLANDRICH: Thank you, Your Honor.

8 **DIRECT EXAMINATION**

9 BY MR. McLANDRICH:

10 Q. Good morning, Mr. Monheim.

11 A. Good morning.

12 Q. Would you start by giving your full name and spelling it
13 for the record, please.

14 A. Anthony Monheim, M-O-N-H-E-I-M.

15 Q. Mr. Monheim, would you start by telling the jury about
16 your educational background.

17 A. I have a bachelor's degree in law enforcement from
18 Western Illinois University and a master's degree in public
19 administration from St. Thomas of Villanova University in
20 Miami, Florida.

21 Q. All right, sir. And would you tell the jury about your
22 training as a law enforcement officer?

23 A. I started with Miami-Dade in 1974 and retired in 2004.
24 So I did 30 years as a police officer with Miami-Dade. I
25 started in the academy in October of 1974, graduated in

1 March of '75, and remained as a uniformed police officer/
2 patrolman for the next 18 months.

3 I was fortunate enough to be transferred to the robbery
4 bureau after that, and I spent the next 16 years in robbery
5 as both a detective and a supervisor. I was promoted to
6 sergeant in 1981 and remained in the robbery bureau as a
7 sergeant in charge of a squad of robbery detectives.

8 In 1992, I was transferred to homicide where I remained
9 until the end of my career in 2004.

10 **Q.** And have you had further employment in the law
11 enforcement field subsequent to your retirement?

12 **A.** I have. I teach homicide investigations courses. I
13 have written -- initially started teaching for the
14 International Association of Chiefs of Police, and I started
15 teaching for the Southern Police Institute, a group called
16 Taylor Group, Public Safety Training Council, in Indiana.

17 Eventually, after I taught several years for those
18 organizations, I formed my own company called
19 homicidettraining.com. And I've traveled all over the United
20 States teaching homicide investigations courses, not only
21 homicide but death investigations. We start with natural
22 death, go into suicide, accidental death, and eventually
23 murder. So I've been doing that and a few expert witness
24 cases since I retired.

25 **Q.** And have you had training and exposure and perform

1 training with respect to photo arrays?

2 **A.** I have. I started teaching actually in 1985 part-time
3 while I was working. And one of the courses I taught was a
4 robbery investigations course for the Southern Police
5 Institute located in Louisville, Kentucky.

6 And I traveled across the country teaching robbery
7 investigations. A significant block of that teaching was
8 photo lineup and photo IDs, live lineups, show-ups, et
9 cetera.

10 **Q.** And have you testified in state and federal courts, been
11 qualified as an expert witness?

12 **A.** I have, yes.

13 MR. McLANDRICH: Your Honor, I'd move that
14 Mr. Monheim be admitted as a -- qualified as an expert in
15 police practices.

16 MR. OWENS: No objection.

17 THE COURT: Okay. He can be.

18 BY MR. McLANDRICH:

19 **Q.** Now, Mr. Monheim, if you would slow down just slightly, I
20 think the court reporter would probably be happier.

21 **A.** Sorry.

22 **Q.** Would you tell the jury whether there were established
23 police practices with respect to the eyewitness
24 identifications, and particularly photo arrays, back in 1990?

25 **A.** There were, yes.

1 Q. All right. And what were some of the sources of those
2 accepted practices?

3 A. A lot of it was just on-the-job training. Your
4 training officer, your training detective, once you made the
5 rank of detective, would teach you how to compile and
6 compose photo displays, how to conduct a live lineup, how to
7 conduct show-ups. But there were publications from
8 associations like the International Association of Chiefs of
9 Police that gave guidelines on how to perform those.

10 But basically, it was just trial and error. The
11 detectives learn as they -- as they went along by going to
12 suppression hearings and finding out what worked and what
13 didn't work, what was acceptable and what wasn't acceptable.
14 So it was kind of a learning experience for each detective
15 as they -- as they became a detective.

16 Q. And you reference the International Association of Chiefs
17 of Police. What exactly is that?

18 A. It's a fraternal organization that promotes and
19 supports professionalism in police work. It's made up
20 mostly of police chiefs and high-level administrators.
21 There are very few detectives or investigators or members or
22 hardly any really of their members of the International
23 Association of Chiefs of Police. It's mostly for higher
24 level administrators.

25 Q. And would they put out publications that not only set

1 current standards but were efforts to promulgate new standards
2 or improve the practice of police operations?

3 A. Yes. That was their function, was to try and improve
4 the professionalism of law enforcement, yes.

5 Q. Now, do they actually make, quote-unquote, standards that
6 are adopted nationwide?

7 A. No. They make suggestions, but not all the suggestions
8 they make are adopted by every police agency.

9 Q. And would each agency have its own standards or policies
10 and procedures that controlled photo arrays?

11 A. Yes.

12 Q. And various other police activities?

13 A. Yes. Not only photo arrays, but many other things,
14 yes.

15 Q. All right. Now, are you familiar with *Training Key 414*
16 that was issued by the International Association of Chiefs of
17 Police?

18 A. I am.

19 Q. And when was that published?

20 A. I believe it was in 1992.

21 Q. And that would have been after the photo array in this
22 case?

23 A. Yes.

24 Q. And, again, did that set out accepted standards for photo
25 arrays as well as proposed improvements for photo arrays?

MONHEIM - DIRECT (McLandrich)

1391

1 **A.** It did. It made suggestions to try and raise the bar,
2 so to speak, in how professional police agencies work, yes.

3 **Q.** And was that any sort of binding standard on police
4 officers or departments?

5 **A.** No.

6 **Q.** Now, was a double-blind administration an accepted police
7 standard in 1990?

8 **A.** No, it was not.

9 MR. OWENS: Objection.

10 THE WITNESS: I was teaching --

11 THE COURT: Hold on a second.

12 MR. OWENS: Leading.

13 THE COURT: I'll allow it.

14 Don't lead, Counsel.

15 MR. McLANDRICH: Thank you, Your Honor.

16 BY MR. McLANDRICH:

17 **Q.** You can respond.

18 **A.** No. I was teaching at the time robbery investigations
19 courses that taught photo displays and how to show photo
20 display, and double-blind was never mentioned. It was never
21 used by any police agencies back then as far as I know. In
22 fact, it's controversial even today. Some agencies use it
23 and some don't.

24 **Q.** Now, is double-blind administration referenced in
25 *Training Key 414*?

1 A. It is, as a suggestion, yes.

2 Q. And in your mind, is there a difference between a
3 suggestion and an accepted, recognized standard?

4 A. Sure, absolutely.

5 Q. Now, did accepted police standards in 1990 -- describe --
6 so I don't get into leading, describe, if you would, accepted
7 police standards for photo arrays in 1990.

8 A. 1990 -- it was the late '80s or early '90s, it was very
9 simple. You would compile six pictures in a photo array.
10 Sometimes they called it photo display. And when you
11 compiled the pictures, they were separate photographs, and
12 they were shown in what's known as a six-pack. You would
13 lay -- if you were showing it at someone's home, you would
14 maybe use the dining room table, and you would lay the
15 photos out three in a row, two rows, and you would tell them
16 that the person may or may not be -- for example, in a case
17 where I was working as a robbery detective, the person that
18 robbed you may or may not be in these photos. I'd like you
19 to take a look and see if you recognize anyone. And then
20 you would ask them to look at the photographs.

21 Q. And what's the purposes of those various elements or
22 standards?

23 A. Well, you don't want them to feel that they have to
24 pick someone out. You tell them they may or may not be in
25 this photo display so they are not -- they don't feel

1 compelled that that person is in there so they have to pick
2 a picture.

3 Q. And what other sorts of concerns might exist aside from
4 telling them that they may or may not have to pick out
5 someone?

6 A. Many times you would tell them that people's hair
7 changes. Remember -- we would tell the witnesses, remember
8 that people cut their mustaches off, trim their beards,
9 sometimes they grow a beard, sometimes they cut their hair.
10 So pictures may not completely depict the way the person
11 looked at that time, so look at the facial features of that
12 person, is what we would try to instill in them.

13 Q. Was such a standard -- I am sorry -- was such a comment
14 within accepted police standards at that time?

15 A. Yes.

16 Q. Is it today?

17 A. Yes.

18 Q. Now, when you contact a witness to view an array, do they
19 know why they are being contacted?

20 MR. OWENS: Objection.

21 THE COURT: Rephrase.

22 BY MR. McLANDRICH:

23 Q. How would you go about contacting a person that you
24 wanted to show an array?

25 A. Well, in the late '80s, early '90 was very -- way

1 different, very different than it is today. If you recall,
2 there were no cell phones. There was no email. Many times
3 we would have to go to someone's house to see if we could
4 find them, to locate them to show them the photo display.
5 If we could -- if we could reach them on the phone, we might
6 ask them to come into the police department to look at
7 photos, but it was generally incumbent upon the detective to
8 go out and find the witnesses.

9 Q. And would you explain to this person why you were
10 reaching out to them?

11 A. No. We'd just tell them we would like them to look at
12 some photographs.

13 Q. And would they understand that was in connection with a
14 criminal investigation?

15 MR. OWENS: Objection.

16 THE COURT: Sustained as to what they understand.

17 MR. McLANDRICH: All right.

18 BY MR. McLANDRICH:

19 Q. With respect to the physical attributes of the picture
20 itself -- the pictures themselves that would be in a photo
21 array, what were the standards in 1990 with respect to that?

22 A. Very similar to what they are today. The overriding
23 factor is that the lineup has to be fair. No one can stand
24 out, especially the person that is the suspect cannot stand
25 out in any way in the lineup. It has to be a fair lineup.

1 But it also has to be a lineup that's not too good. We
2 can't put sextuplets or triplets in the lineup and make it
3 too hard for the witness to make an identification. You
4 want them to -- it would defeat the purpose of showing the
5 lineup.

6 And when you show the lineup, the purpose of showing
7 the lineup is twofold: It's to find out if the person that
8 you suspect is the person that committed the crime; and if
9 not, to exonerate them, to realize that they are not the
10 person and to direct your investigation in another
11 direction.

12 **Q.** And what about the other attributes of the photograph
13 other than the persons in it, characteristics of the
14 photograph as a photograph?

15 **A.** You try and make them similar if you can make them --
16 for example, if you have a Polaroid of the suspect, you
17 would try and include Polaroid pictures as fillers, the five
18 other fillers in the photograph. If you use mugshots, you
19 would try to use mugshots as fillers.

20 Sometimes it was very difficult. You could -- it's
21 even conceivable that you could mix and match as long as
22 that one person that is the suspect doesn't stand out in any
23 way. It has to be fair.

24 **Q.** When you had -- how did you -- what were the standards,
25 rather, in 1990 with respect to the presentation of photo

1 arrays if there was more than one witness to a crime?

2 **A.** Well, we would certainly try to show the photo displays
3 at the same time. It just saves the detective time and
4 energy if you can get those people together. But that was
5 not always possible. Remember, as I said, there were no
6 cell phones back then. You couldn't text somebody and tell
7 them you were on your way. You couldn't send them an email.
8 You couldn't call them on the cell phone.

9 So if we would respond to somebody's house, say, for
10 example, if a husband and wife were witnesses to a murder
11 or -- a murder or a robbery, if we would knock on the door
12 and the wife were there and the husband was not, maybe he
13 was at work, we would show the photo display to the wife and
14 then ask her to have the husband contact us so that we could
15 show the display to him. We would explain to her that we
16 don't want her to discuss the -- if she did make an
17 identification, not to discuss the photo display in any way
18 with her husband.

19 And if we did return to show the photo display, we
20 would make sure that we rearranged the photos so that the
21 photo was not in the same position as it was when the wife
22 made the identification. That's just an example.

23 I've had cases where we would have 40 people on a bus.

24 MR. OWENS: Objection.

25 THE COURT: Is that an objection?

1 MR. OWENS: Yes, Your Honor.

2 THE COURT: Overruled.

3 THE WITNESS: I have had cases where we had 40
4 people on a bus that were robbed by a gunman would come in and
5 rob each person on the bus. It was very difficult, of course,
6 to bring all those people together and show them lineups all
7 at the same time. So we'd have to go individually to
8 everyone's house and show those lineups.

9 BY MR. McLANDRICH:

10 Q. And that was within accepted police practice standards in
11 1990?

12 A. Yes, it was.

13 Q. Is there a difference in police practices between
14 something that's considered a best practice and something
15 that's considered a required standard?

16 A. Yes.

17 Q. And which are -- which is an officer bound by?

18 A. The required standard. Best practices are just raising
19 the bar, as I said earlier.

20 Q. Police departments, do they develop their own policies
21 and procedures?

22 A. Most do, yes.

23 Q. And are at times those policies and procedures in excess
24 of what legal requirements may be?

25 MR. OWENS: Objection. This is undisclosed.

1 THE COURT: Do you want to respond?

2 MR. McLANDRICH: I don't see how it's any different
3 than the question before it, quite frankly. It's just simply
4 an extension of it.

5 THE COURT: Go ahead.

6 MR. OWENS: I should have objected earlier. He's
7 right.

8 THE COURT: He can answer then.

9 MR. OWENS: I mean, this is not in his report. So I
10 am just trying to give a little leeway, but now he's
11 continuing to go down this road of an undisclosed opinion
12 about practices and departments and things like that.

13 THE COURT: Restate your question.

14 MR. McLANDRICH: Sure.

15 BY MR. McLANDRICH:

16 **Q.** Do police departments at times develop policies and
17 procedures that are beyond the legal requirements?

18 THE COURT: Okay.

19 MR. OWENS: Objection.

20 THE COURT: And you are objecting to that.

21 MR. OWENS: It's undisclosed.

22 THE COURT: It's undisclosed.

23 Overruled. He can answer it.

24 THE WITNESS: Yes.

25 BY MR. McLANDRICH:

1 Q. And why is that?

2 MR. OWENS: Same objection.

3 THE WITNESS: Many departments try and --

4 THE COURT: I'll overrule it.

5 Go ahead.

6 THE WITNESS: I'm sorry.

7 THE COURT: Go ahead.

8 THE WITNESS: Many departments try to restrict their
9 officers even more. For example, in chase situations, there
10 is no prohibition for chasing in general, but many departments
11 have a chase policy where they disallow chasing of a vehicle
12 at certain speeds. So that would be an example.

13 BY MR. McLANDRICH:

14 Q. And what's -- when you are presenting an array to a
15 witness, what's the standard practice in 1990? What was the
16 accepted police practice?

17 A. As far as presenting it?

18 Q. Yes. How would it be presented? What were the steps
19 that an officer would take?

20 A. Well, as I mentioned, you would locate a witness
21 probably at their home or ask them to come in. And you
22 would ask them to sit down maybe at the dining room table or
23 kitchen table, and you would take a six-pack of photographs.

24 Back then -- the windows that are used today weren't as
25 prevalent as they are today, but back in the '80s, the late

1 '80s and early '90s, six photographs were laid down in
2 front -- of mugshots, so to speak, were laid down in front
3 of the witness, and they were asked to look at the
4 photographs. They were told, as I said earlier, that the
5 person may or may not be in this photo array, and tell me if
6 you recognize anyone.

7 Q. And then how would that identification be documented?

8 A. If they made an identification, back then the only real
9 requirement was for them to sign the back of the picture.

10 Q. Would they put any additional information on it?

11 A. They may. I usually asked them to write something
12 about what this person did, and I asked them to put the date
13 on that. I would ask them to write, for example, this is
14 the person that robbed me, this is the person that had the
15 gun, something like that. Just a short little sentence.
16 But that wasn't required. The only requirement really at
17 the time was to sign the photo.

18 Q. And were there additional documentation standards that
19 were required of the officer with respect to the performance
20 of the array?

21 MR. OWENS: Objection; vague. I don't know what he
22 means by "required." By whom?

23 MR. McLANDRICH: Required by accepted police
24 standards. I'll just ask it over.

25 THE COURT: Overruled.

1 He may answer.

2 THE WITNESS: No, not really. It was a lot of
3 leeway. There was a lot of leeway for the detective to use.

4 BY MR. McLANDRICH:

5 **Q.** What was the accepted police standard with respect to
6 communications with the witness once that identification had
7 been made?

8 **A.** It was my practice not to tell the witness whether they
9 made an identification or not, and the reason I chose not to
10 do that would be because I didn't want the witness to go to
11 the prosecutor or go to the -- in front of a jury and say I
12 know it's that person because the detective told me so. I
13 don't think there was any prohibition back then that you
14 could tell them, but it was my policy not to do that.

15 **Q.** Were there any standard police practices with respect to
16 recording confidence statements in 1990?

17 **A.** No. Some detectives did, some -- most detectives are
18 note takers, and they take copious notes. So most
19 detectives would -- in their notes, after the identification
20 was made, would make some type of notification in their
21 notes or notation, I shall say, in their notes of how the
22 display was presented and how the identification was made.
23 But there was no requirement to do that, no.

24 **Q.** Was there any standard police practice in 1990 with
25 respect to recording the amount of time it took the witness to

1 make the identification?

2 **A.** No. Detectives -- again, some detectives would do
3 that. They would record it in their notes, but there was no
4 requirement.

5 **Q.** Was there any police standard in 1990 with respect to a
6 requirement that the officer record all their statements in
7 the conversation regarding the presentation of the photo
8 lineup?

9 **A.** No.

10 **Q.** Are you familiar with the term "tunnel vision"?

11 **A.** Yes.

12 **Q.** And --

13 MR. OWENS: Objection. This is undisclosed.

14 THE COURT: Counsel?

15 MR. McLANDRICH: I don't frankly recall whether it's
16 in his report or not, Your Honor.

17 THE COURT: Sustained.

18 BY MR. McLANDRICH:

19 **Q.** When an officer -- well, strike that.

20 Are you familiar with the organization PERF?

21 **A.** I am.

22 **Q.** And in your opinion, is that an authoritative, respected
23 police standards organization?

24 **A.** In my opinion, no.

25 **Q.** Were there any other published standards that you're

1 aware of that were nationally accepted standards in 1990?

2 A. No.

3 MR. OWENS: Objection.

4 THE COURT: Well, with regard to what, Counsel?

5 BY MR. McLANDRICH:

6 Q. I'm sorry. With respect to the development and
7 presentation of photo arrays.

8 A. Not that I'm aware of, no.

9 Q. That's all I have for you. Thank you, sir.

10 MR. OWENS: Do they go next? At this point, I don't
11 know the answer to that, actually.

12 THE COURT: I don't either. I shouldn't admit that.

13 MR. OWENS: Sorry. It just occurred to me.

14 MS. FRICK: Your Honor, I would think that because,
15 you know, this deals with their claim, that they would go
16 next.

17 THE COURT: That would be my -- that would be my
18 inclination, that you would go, and then if counsel has some
19 further things he can add. And then as I've always done, I
20 have given everybody an opportunity to hear everything, so --
21 that's appropriate.

22 MR. OWENS: Thank you, Judge.

23 **CROSS-EXAMINATION**

24 BY MR. OWENS:

25 Q. Good morning, sir.

1 A. Good morning.

2 Q. And when you do your expert consulting work, you try to
3 be an umpire, right?

4 A. Good choice of words, yes.

5 Q. And that's the word you used at your deposition a couple
6 years ago, right?

7 A. Did I? Maybe.

8 Q. All right. And so you've done, I think you described it,
9 just a handful of consulting cases; is that right?

10 A. Maybe seven or eight.

11 Q. And most of those cases that you do your consulting with
12 involve individuals who were previously convicted, right?

13 A. Yes.

14 Q. The convictions were dismissed, right?

15 A. Yes.

16 Q. And so, for example, one case here in Ohio was --
17 involved a man named Dewey Jones, right?

18 A. Yes.

19 MR. McLANDRICH: Objection. This is beyond the
20 scope of direct.

21 THE COURT: What was the purpose?

22 MR. OWENS: Bias.

23 THE COURT: Are you going to go into all the facts
24 of that case?

25 MR. OWENS: No. I was going to just mention at a

1 very high level. I have three questions.

2 THE COURT: All right. Go forward.

3 Overruled.

4 BY MR. OWENS:

5 Q. Mr. Jones' case, like this case, involved issues related
6 to identifications, correct?

7 A. Partially, yes.

8 Q. And in that case, you were retained by the defendant
9 police officer accused of having improper identifications,
10 correct?

11 A. Yes.

12 Q. And you were also a defense expert in that case in Ohio
13 involving an individual named Clarence Elkins, correct?

14 A. Yes.

15 Q. That case, like this one, had identification issues,
16 right?

17 A. Yes.

18 Q. Mr. Elkins had been convicted, and his conviction was
19 overturned later by DNA evidence, right?

20 A. That's correct.

21 Q. Now, I want to make sure I understand. So you did
22 indicate that there were established practices when it came to
23 policing administration of identifications in 1990, correct?

24 A. Yes.

25 Q. And police officers in 1990 also knew that there was a

1 risk of mistaken identification, correct?

2 A. Yes.

3 Q. And the -- there was a risk of mistaken identification
4 that was well understood in 1990 that because witnesses might
5 have a genuine desire to see the perpetrator of a violent
6 crime be brought to justice, that they might be -- excuse
7 me -- overly influenced by suggestions communicated to them
8 during an identification process, right?

9 A. That's true.

10 Q. And that was the case in 1980s?

11 A. Yes.

12 Q. And certainly by the time you got to 1990, right?

13 A. Yes.

14 Q. And the standards that existed in 1990 were more than
15 just trial and error. They were well established, correct?

16 A. Yeah, they were for the past 40 years. The basic
17 methodology used to show a photo display had been handed
18 down from generation to generation of detectives, and that's
19 what they use. That's what detectives and investigators
20 use, what was -- how they were trained, to show a photo
21 lineup or -- a live photo lineup or show-up.

22 Q. In addition to being well-established for 40 years, as
23 you say, by the time you get to 1990, those standards didn't
24 change that much in the late to mid '90s right?

25 A. That's true. That's correct.

1 Q. So, for example, in your report, you cite a *National*
2 *Institute of Justice* document from 1999, right?

3 A. Yes.

4 Q. And it's your testimony, as you stated in your report,
5 that the standards documented in that 1999 document from the
6 *National Institute of Justice* reflect standards that were in
7 effect generally in 1990, right?

8 A. They were similar. There may have been a higher bar in
9 some of the statements that were made, but they were
10 similar, yes, very similar. As you said, they hadn't
11 changed much.

12 Q. Well, at any point in your report, do you say there's a
13 higher bar related to those 1999 standards?

14 A. No. I just said that earlier.

15 Q. Got it. Also in your report, you do cite this training
16 key from the *International Associations of Police*, 414, right?

17 A. I do.

18 Q. And that training key was published in 1992?

19 A. That's correct. I believe.

20 Q. I'm sorry.

21 A. I believe.

22 Q. And that training key published in 1992 wasn't breaking
23 any new ground, correct?

24 A. No.

25 Q. And instead, it summarized police -- established policing

1 practices that were in effect in 1990 and years before,
2 correct?

3 A. Some of it did. Some of it actually went a little
4 beyond what was being done by detectives at that time.

5 Q. Anywhere in your report, sir, did you indicate any part
6 of *Training Key 414* goes beyond the established practices that
7 existed in 1990?

8 A. I don't know that I did, no.

9 Q. And, in fact, at your deposition, when I asked you
10 questions about this training key, didn't you agree with me
11 that the 1992 training key reflects practices that were in
12 effect in 1990?

13 A. It did, that's correct. But there were some portions
14 of it that were -- I hate to use it again -- but a higher
15 bar, raising the bar.

16 Q. The first time you said that about this is today, right?

17 A. I don't know -- I don't recall what I said in the
18 deposition.

19 MR. OWENS: 283.

20 THE COURT: What do you want?

21 MR. OWENS: Well --

22 THE COURT: He doesn't remember.

23 MR. OWENS: Sure.

24 BY MR. OWENS:

25 Q. Would it help you to see your deposition?

1 **A.** It might.

2 **Q.** All right.

3 MR. OWENS: Can we show him Exhibit Number 283 at
4 page 34, starting on line 25 and then going over to page 35.

5 BY MR. OWENS:

6 **Q.** Do you see where at the bottom of 34, sir, it's just the
7 last line where it says, "Question: Right?" and then goes
8 onto the top of 35?

9 **A.** Yes.

10 THE COURT: And when you're done reading, just look
11 up.

12 THE WITNESS: Yes. All the way down to the end of
13 the page?

14 BY MR. OWENS:

15 **Q.** No. Just, I mean, I was just focusing on the first five
16 lines there.

17 **A.** Okay.

18 **Q.** Did you have a chance to glance at that, sir?

19 **A.** Yes.

20 THE COURT: You can have a seat now.

21 BY MR. OWENS:

22 **Q.** You can have a seat. Thank you.

23 THE COURT: Question.

24 BY MR. OWENS:

25 **Q.** And does that refresh your recollection that at your

1 deposition, that you testified that the *Training Key 414*
2 exemplifies best practices described in 1990, even if they
3 weren't required by every department?

4 A. I don't know if that's what I said.

5 May I stand up again, Your Honor?

6 My answer was yes, but they would not have been used by
7 every department. They were goals to aspire to.

8 Q. Okay. You also testified that -- at any rate, let's try
9 to move forward here and not get stuck.

10 A. Okay.

11 Q. You cited *Training Key 414* in your report, correct?

12 A. Yes.

13 Q. And *Training Key 414* provides that "Erroneous
14 identifications create more injustice and cause more suffering
15 to innocent persons than perhaps any other aspect of police
16 work," correct?

17 A. I don't know if that came from *Training Key 414*. It
18 could have. But that was in my report, yes. It may have
19 come from a court decision. I'm not sure where it came
20 from.

21 Q. And because of the risk of mistaken identification to
22 innocent individuals, police officers knew in 1990 that it was
23 important to be careful about how identifications were
24 administered, correct?

25 A. That's correct, yes.

1 Q. And so we mentioned one aspect of being careful is not
2 wanting to influence a witness, right?

3 A. Yes.

4 Q. And you would want to create a fair lineup, correct?

5 A. That's correct.

6 Q. And part of the reason that the fair lineups were
7 especially important at that time, as you mention on direct
8 examination, is that in the late '80s and early '90s there was
9 a lot less forensic evidence available, right?

10 A. That's correct. There was no DNA. There was no
11 videos. Today, videos are ubiquitous. They are everywhere.
12 So people expect to see a video of a crime and DNA. So
13 there was none of that in forensics.

14 Q. And so police should be careful about influencing a
15 witness's memory before the photo identification, right?

16 A. I think that's a correct statement, yes.

17 Q. Police should avoid influencing a witness's memory during
18 the administration of a photo identification, correct?

19 A. Sure, sure.

20 Q. And police should avoid influencing a witness's memory
21 after a photo identification, correct?

22 A. With -- within limits, yes, because once the photo
23 identification is made, it's made. You can't -- you know,
24 you can't undo it, if it is a positive identification that's
25 made.

1 So there are certain statements that detectives can
2 make after that. And it's axiomatic. The defendant -- or
3 the witness is going to know when they are asked to sign the
4 photograph that they have made an identification. And a few
5 days later, they are going to receive a subpoena to go to
6 the prosecutor's office, and with the name of the defendant
7 on there. So it's not a secret. There is no secret here.

8 But it was my policy not to tell them the name of the
9 person or that they had made an identification, but by
10 signing, they knew that they had made an identification.

11 MR. OWENS: And this is Mr. Monheim's deposition at
12 page 81, lines 2 through 5.

13 THE COURT: Okay. And what are we doing there?

14 MR. OWENS: We're impeaching the witness, Your
15 Honor.

16 THE WITNESS: Do you want me to go to it?

17 BY MR. OWENS:

18 **Q.** No.

19 MR. OWENS: I think I can just read it, right?

20 THE COURT: Yes, you can.

21 Wait a minute. Do you guys have it?

22 MR. McLANDRICH: Not yet, Your Honor. I'm sorry.
23 What line?

24 MR. OWENS: 81, page 81.

25 MR. McLANDRICH: And lines?

1 MR. OWENS: At the top.

2 MR. McLANDRICH: Okay.

3 BY MR. OWENS:

4 Q. All right. And at your deposition, were you asked these
5 questions -- or asked this question, and did you give this
6 answer?

7 "Question: And police should avoid influencing a
8 witness's memory after an identification procedure and before
9 they go to court, correct?"

10 "Answer: I think that's correct, yes."

11 A. Yes.

12 Q. Let's talk about the before aspect, before we administer
13 a lineup, all right?

14 A. Okay.

15 Q. You agree with me that it was an established practice in
16 1990 that police would want to avoid indicating to a witness
17 that you have a particular suspect whose picture is in the
18 array, correct?

19 A. Yes.

20 Q. Now let's talk about -- and as you testified here, that
21 blind administration was a new advent, right? Not a -- not
22 applicable in 1990, right?

23 A. Correct, that's correct.

24 Q. And that's even though the fact that the *Training Key* 414
25 that you mention in your report specifically cautions that

1 there should be blind administration, right?

2 MR. McLANDRICH: Objection. I think that
3 mischaracterizes the training key.

4 THE COURT: Well, try to rephrase, Counsel, and
5 we'll see whether we get there.

6 MR. OWENS: No problem.

7 BY MR. OWENS:

8 **Q.** The training key says, "In conducting the lineup, it is
9 highly advisable that officers who are not assigned to the
10 case handle the procedure. This helps to minimize the
11 possibility that the officers who are conducting the
12 investigation will, in their zeal to solve the case, convey,
13 inadvertently or otherwise, clues to the witness as to which
14 person to pick out, or put pressure on the witness to pick out
15 somebody."

16 Do you recall that being in the training key?

17 **A.** I do.

18 **Q.** Is it your testimony that that was not something that was
19 well-known in 1990 but was a new suggestion?

20 **A.** That's correct. As far as I know -- and I was training
21 officers all over the country, detectives all over the
22 country -- no one was abiding by that. No one was using the
23 blind -- the double-blind system to show a photo display.

24 **Q.** And so even though it's in this training key, you don't
25 mention that there is a difference or discrepancy between the

1 training key that you cited in your report and that issue,
2 correct?

3 A. I don't know that I did, no.

4 Q. Now, do you think -- and we're talking, I sort of asked
5 you about before, during, and after.

6 A. Um-hmm.

7 Q. And you indicated on direct examination officers would
8 want to document aspects of the administration of the array,
9 correct?

10 A. No. What I said was some detectives would document it,
11 but there was no requirement to do it at that time.

12 Q. Okay. Would it be irregular for an officer in 1990 to
13 claim a person made an identification but failed to have the
14 witness sign it?

15 MR. McLANDRICH: Objection.

16 THE COURT: Basis?

17 MR. McLANDRICH: It's not a question about police
18 standard. It's a question asking about regularity or
19 irregularity.

20 MR. OWENS: I can rephrase.

21 THE COURT: Rephrase.

22 BY MR. OWENS:

23 Q. Now, you just mentioned something about having witnesses
24 sign a photograph, correct?

25 A. Correct.

1 Q. After they have made an identification, correct? And
2 it's your testimony that that was part of sort of practices
3 that existed on the ground in 1990, right?

4 A. That's correct, yes.

5 Q. Would it be a departure from those accepted practices for
6 an officer to claim that somebody made an identification
7 without having them sign the picture?

8 A. Well, there are exceptions where it could be recorded
9 by a stenographer, the identification. There are other
10 exceptions, that they could sign a supplemental form
11 indicating which photo they chose. But back then the
12 standard was to sign the picture.

13 Q. Got it. And would it be a departure from accepted
14 practices for a police officer to claim that a witness had
15 made an identification if a witness had actually been unsure?

16 A. Are you saying lie about the identification?

17 Q. No, I didn't say that. I said would it be a departure
18 from accepted practices for a police officer to claim that a
19 witness made an identification if the witness was actually
20 unsure or said that the person merely resembled the
21 perpetrator?

22 A. That's not an identification, resemble. That's a
23 tentative ID. In photo displays, you are looking for
24 positive IDs, not tentative IDs or resembles. Resembles is
25 not an identification, no.

1 Q. Let's move to after the administration of an
2 identification procedure. You wouldn't want to tell, even in
3 1990, a witness that they had picked out the right person or
4 the person you thought was the suspect, correct?

5 A. That was my personal preference, yes.

6 Q. Well, I thought you testified that you would never tell
7 them that they picked out the right person, correct?

8 A. I would not.

9 Q. And that was an established practice at the time,
10 correct?

11 A. That was my policy. I don't -- I don't think it was an
12 established practice at the time. I don't think there is
13 any prohibition from telling them that they picked out the
14 right person after the identification is made because once
15 it's made, it's made. That's it.

16 Q. Got it. Well, the *Training Key 414* that you cite in your
17 report indicates that "Witnesses should not be praised or
18 congratulated for picking out the suspect because this may
19 serve to reinforce a shaky identification, convincing the
20 witness that he has picked out the actual perpetrator when the
21 witness is in some doubt," correct?

22 A. I would agree with that, yes.

23 Q. And so that increases the chances of a miscarriage of
24 justice, correct?

25 A. Correct.

1 Q. Now, along those lines, it would be inconsistent with
2 established practices in 1990, after an identification, for a
3 police officer to tell a witness going into court that the
4 suspect has changed their appearance, right?

5 A. Well, it's permissible for identification purposes to
6 say a person -- just remember, generally speaking, generally
7 speaking, people cut their hair, they change their hair,
8 they shave their beards, they shave their mustaches. So,
9 generally speaking, people alter their facial -- I'm
10 sorry -- their hair features. So that would be permissible.

11 Q. You were talking about before you make an
12 identification --

13 A. Right.

14 Q. -- you have a standard admonition which is like, hey,
15 this may not be the suspect. People's hair can change.
16 People's -- you know, things like that can change, right?

17 A. Exactly.

18 Q. I'm talking about a slightly different moment, okay?

19 A. Okay.

20 Q. After an identification is made, when somebody's going
21 into court to potentially make an identification, you agree
22 with me that it would have been inconsistent with practices in
23 1990 to tell a witness at that point in time that, hey, I've
24 seen the suspect and they've changed their appearance,
25 correct?

1 A. You are referring prior to an in-court ID?

2 Q. Correct.

3 A. Yes.

4 Q. In your report, you opine that in a stressful event a
5 witness's attention is heightened and they have better
6 attention; is that correct?

7 A. Yes.

8 Q. Isn't the opposite actually true in the established
9 policing documents that you have cited?

10 A. Not that I'm aware of. I've dealt with hundreds and
11 hundreds of victims, and when they are under stressful
12 situations, there's a dump of adrenaline. They become more
13 perceptive, it seems to me.

14 THE COURT: Counsel approach.

15 (At sidebar.)

16 THE COURT: This is not an ID expert, and you're
17 talking about --

18 MR. OWENS: I can frame it to make sure that we are
19 talking more specifically about the police procedures at the
20 time.

21 THE COURT: Right. Because now we are going to get
22 into -- I am not saying -- I'm just a little worried about
23 where we're going.

24 MR. OWENS: Okay. I understand.

25 THE COURT: He's not here to basically talk as your

1 expert. Your next expert will be talking.

2 MR. OWENS: Sure. I will be very clear about that.

3 THE COURT: Thank you.

4 (In open court.)

5 THE COURT: Ladies and gentlemen, we're going to
6 take a break this morning, and then we'll get back on it and
7 go on till our lunch hour. Please remember the Court's
8 admonitions. Thank you very much.

9 THE COURTROOM DEPUTY: All rise. This court stands
10 in recess.

11 (Jury out at 10:40 a.m.)

12 (Recess at 10:40 a.m.)

13 (Jury in at 11:09 a.m.)

14 (In open court at 11:10 a.m.)

15 THE COURT: We're back on the record.

16 Ladies and gentlemen of the jury, I'm going to give you a
17 little preview of what we're going to be doing here. We have
18 this witness, and we have another witness that we are trying
19 to get on again because of location and time restraints.
20 We're going to be a little bit out of our normal routine.

21 What I plan to do is we will go to our regular noon
22 recess for lunch, but I'm going to ask you if you could please
23 take a short lunch today and if you could be back here no
24 later than 12:35. And we will move on, wherever we are in
25 these witnesses. And hopefully, hopefully, by doing this, we

1 may be able to release you folks a little early today. So
2 just bear with us and be patient. I can't make any guarantees
3 about anything, but that's my plan at this point in time.

4 All right. Thank you.

5 Counsel ready to proceed?

6 MR. OWENS: Yes, Your Honor.

7 THE COURT: All right.

8 BY MR. OWENS:

9 Q. Just a few more questions, all right?

10 A. Yes, sir.

11 Q. I want to take a step back. At some point in your
12 report, you indicated something about witnesses in stressful
13 events. Do you remember that?

14 A. I do.

15 Q. Okay. Your testimony here today is about what the police
16 understanding of eyewitness practices were in 1990, correct?

17 A. That's correct, yes.

18 Q. And you are just offering testimony generally about
19 what -- how police were trained, what they knew about best
20 practices in the policing field, correct?

21 A. Yes, sir.

22 Q. And so when you made that statement about high stress in
23 your report, you were talking about generally the way that
24 police officers might understand it at the time, right?

25 A. I think that's a fair statement, yes.

1 Q. And then I was getting ready to ask you about *Training*
2 *Key 414* from the International Associations of Chiefs of
3 Police. That's a document you cited in your report, correct?

4 A. Yes.

5 Q. And, in fact, you testified in direct examination you
6 worked as an educator with the IACP, correct?

7 A. I did.

8 Q. Okay. And the *Training Key 414* indicates that human
9 perception can be inaccurate especially when people are under
10 stress, correct?

11 A. If it says that, I'd have to agree, yes.

12 Q. Just one more thing about the *Training Key 414* that you
13 cited in your report. Different topic.

14 You're dealing with a situation that has multiple
15 eyewitnesses. Do you remember testifying about that on
16 direct?

17 A. When I mentioned the bus, stuff like that?

18 Q. Yes, exactly. Just drawing your attention back to that.

19 A. Yes.

20 Q. Isn't it true that the *Training Key 414* from the IACP in
21 1992 actually addresses that topic specifically?

22 A. I'm not sure. I'd have to read it.

23 Q. Doesn't that document say that "Where more than one
24 witness has viewed a lineup, witnesses should be kept separate
25 after the lineup procedure has been completed. While

1 discussions between witnesses filed in the lineup are
2 presumably --" I'll stop there.

3 It says that, right?

4 A. I think that's generally true. If you have witnesses,
5 say, if you have five or six witnesses at the police
6 station, you would not let them congregate in a conference
7 room and start showing them lineups and let them go back in
8 that conference room. I would agree with that, yes.

9 Q. Yeah. And so you had a peculiar situation, and when you
10 had 40 people on a bus, that would be harder to manage, right?

11 A. Exactly.

12 Q. Now, if you had a controlled setting where you had two
13 witnesses that you wanted to view a lineup and there was no
14 sort of exigency, you would have kept them separate, right?

15 A. Sure. I wouldn't have shown them the same lineup at
16 the same time, no.

17 Q. And you wouldn't allow them to speak to one another in
18 between showing them -- each one of the lineup separately,
19 right?

20 A. That's not a good policy, I would agree.

21 Q. Last topic. As you understood police practices and
22 training that existed in 1990, you would have understood that
23 the likelihood that three people separately picking out the
24 same person mistakenly or wrongfully would be extraordinarily
25 unlikely unless there was some suggestivity or if that person

1 was just like a look-alike to the perpetrator, correct?

2 MR. McLANDRICH: Objection.

3 THE COURT: Sustained.

4 MR. OWENS: What's the basis of the objection?

5 MR. McLANDRICH: It's not a police policy or
6 practice.

7 MR. OWENS: Okay.

8 BY MR. OWENS:

9 Q. You indicated at least, just so we're on the same page --

10 MR. OWENS: Actually, no further questions, Your
11 Honor.

12 THE COURT: Thank you. Counsel.

13 **CROSS-EXAMINATION**

14 BY MS. FRICK:

15 Q. Thank you. Hello. My name is Dawn Frick. I represent
16 the Miami Township Board of trustees. I just have a couple
17 questions.

18 In light of your experience and expertise, would there be
19 any logical reason as part of the employment, as their
20 employment as a police officer, for a detective to knowingly
21 use an unnecessary -- unnecessarily or unduly suggestive ID?

22 MR. OWENS: Objection, Your Honor. This is
23 undisclosed expert testimony.

24 THE COURT: Overruled.

25 THE WITNESS: Could you repeat? I'm not sure what

1 the question is.

2 BY MS. FRICK:

3 **Q.** Sure. Would there be any logical reason for a police
4 officer to knowingly use an unnecessary or unduly suggestive
5 photo array?

6 MR. OWENS: The same objection.

7 THE WITNESS: No.

8 THE COURT: Sustained -- no. Overruled. I'm sorry.

9 THE WITNESS: No.

10 BY MS. FRICK:

11 **Q.** And would you agree with me that it would be in the
12 employer or the police department's interest to not have an
13 unduly or unnecessarily suggestive lineup?

14 MR. OWENS: Objection; undisclosed and foundation.

15 THE COURT: If you can rephrase, Counsel.

16 MS. FRICK: Sure.

17 BY MS. FRICK:

18 **Q.** Police or police departments have an interest in having a
19 reliable identification in a case, correct?

20 **A.** Yes, I would agree.

21 **Q.** Okay. So it wouldn't be in the police department's
22 interest to have their detectives knowingly use an
23 unnecessarily suggestive identification procedure, correct?

24 MR. OWENS: Objection.

25 MR. McLANDRICH: Objection.

1 MR. OWENS: Undisclosed.

2 THE COURT: This is a -- this expert is qualified in
3 police procedures, right?

4 MR. OWENS: He's been disclosed as it relates to
5 police procedures, yes.

6 THE COURT: Is that correct, Counsel?

7 MR. McLANDRICH: Yes, sir.

8 THE COURT: Sustained.

9 MS. FRICK: No further questions.

10 THE COURT: Thank you.

11 **REDIRECT EXAMINATION**

12 BY MR. McLANDRICH:

13 Q. Just a couple, sir.

14 You were asked on cross-examination about prior expert
15 testimony you have given. Do you recall that?

16 A. Yes, sir.

17 Q. And the fact that you've been an expert in other cases
18 wouldn't cause you to give testimony that wasn't truthful,
19 would it?

20 A. No.

21 Q. And you were asked about being an umpire, right?

22 A. Yes.

23 Q. And the job as an umpire is to call them as they see
24 them?

25 A. Exactly.

1 Q. With respect to the International Association of Chiefs
2 of Police training key or the NIJ study, again, are these
3 documents partly current standard and partly efforts to
4 improve standard?

5 MR. OWENS: Objection. It's both leading and
6 compound.

7 THE COURT: Rephrase.

8 MR. McLANDRICH: Yes, sir.

9 BY MR. McLANDRICH:

10 Q. What are the purposes of organizations and documents
11 published by NIJ and the International Association of Chiefs
12 of Police?

13 MR. OWENS: Objection. It's still compound. They
14 are separate agencies.

15 THE COURT: Overruled. You can answer it if you
16 can.

17 THE WITNESS: Basically, to enhance professionalism
18 in law enforcement.

19 BY MR. McLANDRICH:

20 Q. And how do they go about that?

21 MR. OWENS: Objection.

22 THE WITNESS: By doing a -- I'm sorry.

23 MR. OWENS: It's still vague. I don't know who the
24 "they" is.

25 THE COURT: Do you understand the question?

1 THE WITNESS: I believe he's referring to IACP and
2 NIJ, yes.

3 MR. McLANDRICH: Yes, sir.

4 THE COURT: I'll let him answer.

5 THE WITNESS: Could you repeat it?

6 BY MR. McLANDRICH:

7 Q. Yeah. How do they go about improving police
8 professionalism and standards?

9 A. Well, over the years they've done various studies, and
10 they publish papers, publish model policies that try to
11 guide police departments toward a more professional stance
12 in law enforcement.

13 Q. Would the training key be such a publication?

14 A. It would.

15 Q. Would the 1999 NIJ study that was referred to be such a
16 publication?

17 A. Yes.

18 Q. Now, you were asked about letting witnesses speak to each
19 other where there are multiple witnesses. Do you recall that?

20 A. Yes, sir.

21 Q. And how does that correlate when those witnesses are
22 family members?

23 A. Well, it's very difficult to stop them. I mean, if you
24 have one witness that -- I gave the example of a husband and
25 wife. If you respond to the house and show a lineup to the

1 wife if they were both witnesses to, say, a murder and the
2 wife makes an identification, I would tell that witness not
3 to discuss what she did or what occurred during the photo
4 display with her husband.

5 And to ensure that she didn't, I would rearrange the
6 photos. I would not have the photos in the same position,
7 and just shuffle them like a deck of cards so that they
8 would not be able to talk about which one was the subject --
9 suspect of the lineup.

10 MR. McLANDRICH: Nothing further.

11 THE COURT: With regard to those four questions or
12 something like that.

13 **RECROSS-EXAMINATION**

14 BY MR. OWENS:

15 Q. As a police officer in 1990, you would have understood
16 that witnesses who might speak together about, you know,
17 photos, if they were like the husband and the wife, they might
18 be able to describe things other than just whether it's one,
19 two, three, four, five, and six and actually discuss the
20 pictures themselves, right?

21 A. It's possible. Unlikely, but possible, yes.

22 Q. And if you could, if the witnesses were willing to come
23 to the police station and you could keep them separate, you
24 agree that you would want to do that when you are
25 administering the photo arrays, right?

1 A. That would be the ideal. But logistically, many times
2 it's not possible.

3 Q. If it were possible, that's what you'd do, right?

4 A. That would be the ideal, yes.

5 Q. If you had an unfair lineup on which one of the pictures
6 somebody stuck out, shuffling the pictures wouldn't very well
7 help much, right?

8 A. Well, first of all, you wouldn't show an unfair lineup.
9 But, yes, I agree.

10 Q. You were asked a couple questions on redirect a minute
11 ago about the IACP, and we've had a little bit of a discussion
12 about that, right?

13 A. Yes.

14 Q. *Training Key 414* wasn't the first training key that IACP
15 created about eyewitness identification and the problems
16 associated with it, correct?

17 A. I don't know.

18 Q. Well, training -- IACP *Training Key Number 67* from the
19 1960s describes some of those issues as well, correct?

20 A. I've actually never read that training key.

21 Q. You're not aware of this document?

22 A. Not that I -- not that I recall, no.

23 MR. OWENS: No further questions.

24 THE COURT: Anything else?

25 MS. FRICK: No, Your Honor.

1 MR. McLANDRICH: No, Your Honor.

2 THE COURT: Can this witness be excused?

3 MR. McLANDRICH: Yes, sir.

4 THE COURT: Thank you very much.

5 And your next witness, counsel?

6 MR. McLANDRICH: Dr. Wixted, Your Honor.

7 THE COURT: All right. Ladies and gentlemen, our
8 next witness is by way of video. The witness will be placed
9 under oath and will testify as he would if he was here in the
10 courtroom. You will judge that witness as you would judge any
11 witness that takes the stand with regard to his credibility
12 and his testimony. So please give your attention to the
13 witness. Once we get him there.

14 Counsel, then your next witness?

15 MR. McLANDRICH: Dr. John Wixted, Your Honor.

16 THE COURT: Thank you.

17 Doctor, can you hear me?

18 Doctor, can you hear me?

19 Doctor, can you hear me?

20 THE WITNESS: I can.

21 THE COURT: All right. Doctor, if you would,
22 please, my courtroom deputy will swear you in. Please raise
23 your right hand.

24 **JOHN WIXTED, DEFENDANT MOORE'S WITNESS, SWORN**

25 THE COURT: Doctor, please just try to keep your

1 voice up. We are doing this, of course, by way of video. So
2 we're hoping it works. But we need to keep your voice up so
3 that the jury and everyone here in the courtroom can hear your
4 responses to the inquiries, all right?

5 THE WITNESS: All right. I'm moving my microphone
6 so it will help a little bit.

7 THE COURT: All right. Whatever you -- whatever you
8 believe helps you, okay? All right.

9 Counsel, you may inquire.

10 MR. McLANDRICH: Thank you.

11 **DIRECT EXAMINATION**

12 BY MR. McLANDRICH:

13 Q. Good morning, Doctor, and thank you for being available
14 today.

15 A. Good morning.

16 Q. Would you start off with your full name, and spell it for
17 the record, please.

18 A. My name is John Wixted, J-O-H-N W-I-X-T-E-D.

19 Q. Thank you. And would you describe for the jury your
20 educational background, please?

21 A. I have undergraduate degrees in biology and psychology
22 from the University of California at San Diego. I have a
23 Ph.D. in clinical psychology from Emory University in
24 Atlanta.

25 Q. All right, sir. And would you describe your current

1 employment, sir?

2 A. I'm a professor of psychology in the department of
3 psychology at the University of California - San Diego.

4 Q. All right, sir. And what fields of study and research do
5 you engage in in your current employment?

6 A. My research focuses on all aspects of memory, from the
7 brain mechanisms of memory to cognitive or mental models of
8 memory, to memory in the real world, such as eyewitness
9 memory and memory in the classroom.

10 Q. And for how long have you been engaged in that sort of
11 research, sir?

12 A. Let's see. I think it's 33 years now.

13 Q. And how is it that you became engaged in research with
14 respect to eyewitness memory?

15 A. Well, I conducted research on the basic mechanisms of
16 memory for the first 20 years of my career. That's the
17 brain mechanisms of memory and cognitive models of memory.
18 That's basic science.

19 And about ten years ago a colleague was asked to write
20 a chapter on eyewitness confidence, and he knew that I knew
21 a lot about confidence in general, the basic science
22 understanding of that. And so he asked me to co-author that
23 chapter with him. It's the first time I really read the
24 eyewitness memory literature.

25 But I did, and I started realizing I might have

1 something important to contribute to that field. And so I
2 shifted much of my focus about ten years ago to eyewitness
3 memory.

4 Q. And in addition to research, have you published peer-
5 reviewed articles with respect to eyewitness memory?

6 A. Yes, many.

7 Q. And have you also lectured with respect to eyewitness
8 memory?

9 A. Many times.

10 Q. And have you testified in the past on eyewitness memory?

11 A. I have, multiple times.

12 MR. McLANDRICH: I would move that Dr. Wixted be
13 admitted as an expert in eyewitness memory.

14 MR. OWENS: No objection.

15 THE COURT: All right. He will.

16 BY MR. McLANDRICH:

17 Q. Doctor, how does your approach to eyewitness ID research
18 differ from someone who, say, is a social scientist?

19 A. Well, the way I usually describe it is eyewitness
20 identification procedures conducted by the police, say in
21 the 1970s and 1980s and even the 1990s, often were
22 problematic in a social science sense. So the police
23 officer might have an interpersonal impact on the witness,
24 leading them, inadvertently even, to pick the suspect.
25 That's a social influence on their performance.

1 But over the years, people have figured out how to get
2 rid of those social influences such that the eyewitness
3 memory test is a test of memory, per se. And that's the
4 point at which memory expertise becomes needed. And social
5 psychologists, that's not their area of expertise, but that
6 happened to be my area of expertise. And that was what I
7 saw as being the case ten years ago when I jumped into the
8 field.

9 **Q.** And before you became involved in the field, what was the
10 general belief with respect to the reliability or accuracy of
11 eyewitness identification?

12 **A.** It was, in academia anyway, universally understood to
13 be inherently unreliable. It was in every textbook. Any
14 suggestion to the contrary was met with serious response.
15 But that was the general view.

16 It's still the view of many. Many people to this day
17 are surprised to hear that the evidence with respect to that
18 issue has changed pretty dramatically.

19 **Q.** And how has that evidence with respect to the reliability
20 of eyewitness identification, accuracy, or reliability changed
21 from, let's say, the late '80s, early '90s to the current day?

22 **A.** Well, only recently has it become clear that there's
23 nothing particularly special about eyewitness memory. It's
24 just like every other kind of forensic evidence. There are
25 conditions under which it's reliable and conditions under

1 which it's not reliable. For any kind of evidence, if it's
2 contaminated before you run the test or if you run the test
3 improperly, it can be unreliable. That's also true of
4 eyewitness memory.

5 What's new is the understanding that memory's not
6 contaminated, if you haven't changed the witness's memory
7 inadvertently by the time of the first test, the witness can
8 provide highly reliable information. That's -- that's an
9 understanding that is only a few years old.

10 Q. And you're familiar with Dr. Wells, I take it?

11 A. Yes. We have argued quite extensively in the field.

12 Q. All right. And have you authored any papers together?

13 A. We have. And, in fact, one of the most impactful
14 papers ever in the field of eyewitness identification is
15 a -- we jointly authored a paper. It surprised the field
16 that we would put our swords down and write a paper about
17 what we agree about, and that's what we did, and it's had an
18 amazing impact on the field.

19 Q. And you're aware of the concepts that I believe were
20 developed by Dr. Wells with respect to what's been called
21 estimator variables and system variables?

22 A. Yes. I'm intimately familiar with that distinction.

23 Q. Could you just describe in a general fashion, if you
24 will, what estimator variables are and system variables are
25 and the distinction between them?

1 **A.** All right. Well, when a crime is committed, it's
2 happening well before the police are involved, and there are
3 factors present at the time of the crime that determine how
4 well the witness will be able to remember the face of the
5 perpetrator. For example, if it -- if it is pitch black
6 outside, well, the witness won't be able to even see the
7 perpetrator's face. So that's -- the lighting is an example
8 of an estimator variable.

9 And many other things happening at the time of the
10 crime are like that. They are estimator variables that the
11 police have no control over because they are not involved
12 yet. So the witness might only get a brief look at the
13 perpetrator's face or they might get a long look, but
14 whether it's brief or long is not under the control of the
15 police but does affect the witness's ability to form a good
16 memory of the face of the perpetrator.

17 So variables like that, that are present at the time of
18 the crime that the police have no control over but that do
19 have an affect on the witness's ability to form a memory of
20 the perpetrator, those are estimator variables.

21 Then at some point the police are involved, and they
22 can talk -- now they have control over what they do, and one
23 of the things they do is often present an eyewitness
24 identification test, such as a photo lineup. And how they
25 make the photo lineup, how they administer the photo lineup,

1 they have control over that. And those things can affect
2 memory as well, but those are called system variables
3 because the police have control over it.

4 Q. All right. And you mentioned the opportunity of the
5 victim to view the suspect. And is the longer duration of the
6 ability to view, does that improve the memory or the imprint
7 of the image into the mind of the victim?

8 A. It does. The longer the exposure, the more clearly the
9 memorized face of the perpetrator will be.

10 Q. All right. And, likewise, I take it the quality of the
11 opportunity to view, whether they get to see them at closer
12 distance or further distance or get a good, direct look at
13 them, those things would also affect the quality of the
14 imprint of the memory?

15 A. Yes, that's another estimator variable present at the
16 time of the crime. The witness is either close to the
17 perpetrator and can see his face clearly or far away and
18 cannot see it as clearly and cannot form as good a memory.

19 Q. And you mentioned the fact that the police will present
20 photo arrays at times to victims. And does the delay between
21 the crime event and the presentation of the array, does that
22 impact the ability or accuracy of a witness to be able to make
23 an accurate identification?

24 A. Yes. And that word "accuracy" can be misleading. So I
25 want to say yes to your question, but what that means is the

1 longer -- we call it a retention interval or delay. The
2 more time that goes by, the more memory fades and the less
3 likely it is that the witness is going to be able to
4 identify the guilty perpetrator even if he is in the lineup.

5 It's important to understand that what a delay does not
6 do, it does not, by itself, contaminate the witness's
7 memory. It doesn't put the face of an innocent suspect who
8 might end up in a lineup into the brain of the eyewitness.
9 Other things do that.

10 **Q.** And is the effect of delay on the ability to make a
11 witness identification, has -- that the understanding with the
12 impact of delay, has that changed over time?

13 **A.** Yes, it has, because for many years the field made the
14 mistake of believing that a reduction in accuracy in the
15 sense that I just described, which certainly does happen,
16 accuracy goes down with delay, that was equated with the
17 notion that any ID that is made from a lineup after a long
18 delay is unreliable. But unreliable --

19 MR. OWENS: Objection. Objection. Can we be seen
20 at sidebar on this?

21 THE COURT: All right.

22 (At sidebar.)

23 MR. OWENS: The objection is that the witness is
24 opining about what makes an identification itself reliable. I
25 have no problem with him using the phrase "accurate," things

1 like that, but, you know, reliability is the ultimate issue to
2 be decided by the jury in this case.

3 I specifically avoided asking -- using that word with
4 Dr. Dysart because of that issue. I think I slipped up once
5 and then corrected myself and then said "accurate" both times
6 it happened. So this is the second time he's started to go
7 into reliability, and part of his report will distinguish
8 accuracy and reliability, and I think that's what he's about
9 to go into. So that's our objection.

10 MR. McLANDRICH: So, again, there was no motion in
11 limine with respect to -- and I understand those are
12 preliminary, but that said, he's not using "reliability" in
13 the legal sense in the jury instruction. When he uses
14 "reliability," it's in the academic sense of his research.
15 And he can certainly explain the difference from an academic
16 research standpoint analysis between accuracy and reliability.

17 MR. HERMAN: I have nothing. Thank you.

18 MR. OWENS: This is David Owens again. Sorry for
19 not identifying myself. There was a motion in limine, the
20 *Daubert* motion, and there was a ruling by the Court that the
21 eyewitnesses and other witnesses in the case couldn't address
22 the ultimate issue.

23 MR. McLANDRICH: Couldn't address -- John
24 McLandrich. Couldn't address the specific facts of the case.
25 And he's not going to testify that this particular

1 identification was either accurate or reliable but he is going
2 to explain the academic difference, the research difference
3 between what is meant by accuracy and reliability.

4 It's in a general sense. It's not in a specific case.
5 He's not going to the ultimate issue. He's not --

6 THE COURT: No. I understand that. I'm trying
7 to -- modify your question to "accurate."

8 MR. McLANDRICH: I'll try. In the literature and in
9 his analysis, there's a fundamental distinction between
10 accuracy and reliability. Again, this is no different than
11 like a police excessive force expert who testifies with
12 respect to what excessive force is in police standards. He is
13 not then testifying that the force in a given case was or
14 wasn't excessive.

15 MR. OWENS: This is David Owens again. I guess that
16 would be objectionable. With Dr. Dysart we were very, very
17 careful to avoid her opining or using the word "reliability."
18 It is the ultimate issue as it relates to the jury
19 instruction. I think that there is a way around it for
20 counsel, which you could just ask him whether or not it's
21 accurate or whether or not there is still information that you
22 could gain from an identification over time. What he will say
23 is that the few people who can make an identification, say,
24 nine months later, those -- if they are made with high
25 confidence, those will look -- you just shouldn't use that

1 magic word, which is a term of art.

2 MR. McLANDRICH: Well, again, it's a term of art in
3 the science that has a different import than the ultimate
4 issue of whether this particular identification was or was not
5 reliable.

6 THE COURT: All right. I'll rule when I get back
7 there.

8 (In open court.)

9 THE COURT: Sustained.

10 Rephrase, please.

11 MR. McLANDRICH: I'm sorry. I can't remember
12 exactly what was the question I asked.

13 BY MR. McLANDRICH:

14 Q. So, Doctor, an identification that is made after a period
15 of delay, while there may be fewer of them, are those that are
16 made still highly likely to be correct?

17 A. Yes, that is the effect of increasing delay.
18 Forgetting happens, so that's why the witness is less likely
19 to make an identification with high confidence. But for
20 those that do, the literature shows, up to pretty long
21 delays, the likelihood of an identification that is made
22 being accurate remains very high.

23 Q. And stress is another one of those estimator variables,
24 correct?

25 A. Correct.

1 **Q.** And what's the effect of stress on a person's ability to
2 make an accurate identification?

3 **A.** Well, it's -- there's no single answer to that
4 question. And if stress is too low, if the witnesses --
5 which is unlikely, but just to be complete, if the witness
6 is bored and uninterested and not paying attention because
7 they are so under-stressed, that can impair their ability to
8 form a memory. Then there's an optimal memory of stress.
9 And then stress can be too high, where you're so stressed,
10 again, you can't form a good memory of the perpetrator.

11 But -- and so it reduces accuracy in that sense. If
12 stress is very high, the witness's -- witnesses who are
13 highly stressed are less likely to make a high-confidence
14 identification from a lineup even if the perpetrator is in
15 it. Accuracy is reduced in that sense.

16 Accuracy is not reduced in the other sense, the more
17 important sense that we were just talking about, that given
18 that an ID of a suspect is made with high confidence, its
19 accuracy -- less likely to happen, but when it does happen,
20 its accuracy remains very high.

21 **Q.** And, Doctor, several times now in your answers you've
22 indicated or described an eyewitness identification that is
23 made with high confidence. Can you describe the import or the
24 importance of high confidence with respect to eyewitness
25 identifications?

1 **A.** Yes. When it became clear that the first time you test
2 an eyewitness's uncontaminated memory, it can be -- a
3 suspect identification can be accurate. That isn't --
4 that -- well, it has to be more nuanced about it. It's --
5 the confidence, the certainty of the witness's
6 identification of the suspect matters a lot, contrary to
7 what was understood to be true in the field literally for
8 decades where the assumption was that how certain a witness
9 is in that initial identification is largely uninformative.

10 It turns out to be the most important thing to know
11 because a witness who makes an identification of a suspect
12 from a lineup, a photo lineup on a first test of their
13 uncontaminated memory, if they're uncertain, such an ID is
14 like a clean slip; it's essentially uninformative, even
15 though the police officer might write down "Witness
16 positively identified the suspect," which sounds bad for the
17 suspect. Well, it isn't because it's a coin flip. It's
18 largely uninformative.

19 But if the -- but if the witness makes a high-
20 confidence identification, no signs of hesitancy or
21 uncertainty, that kind of suspect identification is highly
22 reliable. So it's important to know that --

23 MR. OWENS: Objection.

24 THE WITNESS: -- additional piece of information --

25 THE COURT: Hold on.

1 MR. OWENS: It's just the same issue before.

2 THE COURT: The word?

3 MR. OWENS: Yes. I think we can move on. I wanted
4 to note it for the record.

5 THE COURT: I'll deal with it if it occurs again.

6 I'm sorry. Go ahead. I didn't mean to interrupt you,
7 Doctor.

8 BY MR. McLANDRICH:

9 Q. And, Doctor, the Court would like you to avoid the word
10 "reliable" if you can in your answers.

11 A. I understand. And we use it in the scientific
12 literature to mean something other than what the court means
13 by it.

14 MR. OWENS: Objection, Your Honor.

15 THE COURT: Doctor, if you would, just not use it,
16 please. Thank you.

17 THE WITNESS: Okay. I understand. I won't use it.

18 BY MR. McLANDRICH:

19 Q. Now, Doctor, in your research, is a -- is an eyewitness
20 identification considered a memory test?

21 A. Yes, a recognition memory test.

22 Q. And so the key feature of that memory test is what, sir?

23 A. The thing that you're trying to remember is being
24 presented to you again, and you're being asked is this the
25 face that you saw at the time of the crime. That's a face

1 recognition memory test, and a photo lineup is such a test.

2 Q. And do the various aspects of the photograph itself
3 interfere with the ability to engage in that facial
4 recognition memory test?

5 A. I'm not 100 percent sure I understand your question.
6 But the quality of the photo matters. So, for example, if
7 you have a photo that's fuzzy and hard to see, it's going to
8 be hard to tell whether it matches your memory. I'm not
9 sure if I'm answering your question, though.

10 Q. Yes. So it was probably a very poor question.

11 So I'm wondering about various attributes such as the
12 color of the background of a photograph or the size of a head
13 in the photograph or the clothes that the suspect might be
14 wearing, the various finishes that the photograph may have
15 between the different six photos that are generally shown in
16 an eyewitness identification, those sorts of things. Do those
17 impact the ability of the witness to engage in an accurate
18 memory test?

19 A. Not very much at all. That is a -- it came from the
20 social psychology perspective that we were talking about
21 earlier. So you might worry, for example, that if only one
22 person is wearing a white shirt and it's the suspect, that
23 the police are giving a clue who do -- who to pick.

24 But the key point is that the witness might pick up on
25 such a clue, but it's not going to -- it's not going to

1 change the fact that the witness is going to realize that
2 the guy wearing that white shirt, who the police seem to
3 want me to pick, doesn't match the face in my memory. They
4 are not going to fail to notice that. They might pick the
5 guy in the white shirt in such a case, but it's going to be
6 a hesitant, slow, low-confidence identification if it
7 happens.

8 And the relevant research actually suggests that
9 that -- even that doesn't happen, that is, those clues --
10 it's the degree to which the face in the lineup matches the
11 face in the witness's brain that is the main determinate by
12 far about whether or not an identification occurs, not these
13 other factors, these perceptual factors that might be
14 construed by the witness as clues of who I should pick.
15 Those things don't really have much of an effect according
16 to the existing literature.

17 What has a major effect is the degree to which -- it's
18 a memory effect, not a perceptual effect. It's the degree
19 to which the face in the photo lineup matches the witness's
20 memory of the perpetrator. That's the determining variable
21 of whether or not they make an ID and how confident they
22 are.

23 **Q.** And what you just described, is that a parameter or
24 controlling factor of whether a lineup is fair or not?

25 **A.** Well, usually, in many discussions in the scientific

1 literature about what a fair lineup is, they gloss over this
2 important distinction that I'm drawing attention to now. So
3 if, for example, the background or the color of the clothing
4 is different between the suspect and the other people in the
5 lineup, that's a perceptual difference.

6 In the scientific literature, that kind of lineup is
7 often called unfair and is conflated, mixed up with the more
8 important kind of unfair lineup, which is where the
9 suspect's facial features differ from the facial features of
10 the other members of the lineup, and in such a way that it
11 better matches the witness's memory. So to take an extreme
12 example of where this would apply, if a witness said it's a
13 20-year-old white guy who committed the crime and there is a
14 20-year-old white guy in the lineup surrounded by 40-year-
15 old black guys, well, now we know only that one suspect has
16 features that match the witness's memory differentially
17 because the witness told you what's in their memory, and now
18 only that guy has those features. That's an unfair lineup.
19 That does compromise even high-confidence identifications.
20 They are no longer highly accurate under those conditions.

21 **Q.** And in the literature, there is discussion of what's
22 characterized as pristine conditions. You familiar with that?

23 **A.** Intimately.

24 **Q.** And what we've just been discussing, is it related to
25 this concept of a pristine condition?

1 **A.** Yes. A pristine lineup is a lineup that follows the
2 guidelines that researchers have recommended in a consensus
3 statement. And what I just described is one of those
4 pristine conditions. Everyone should match the description
5 of the perpetrator provided by the witness because the
6 witness is telling you here are some features that are in my
7 memory. So everybody should at least match those features.
8 Everybody should be a 20-year-old white guy, for example.

9 **Q.** And what other elements are required for a lineup to be
10 sufficiently pristine to be fair?

11 **A.** Well --

12 **Q.** Or was that a poor question?

13 **A.** If you had left off "to be fair," I could tell you what
14 some of the other pristine conditions are. But to be fair,
15 that is what makes a fair lineup. It's -- if everybody in
16 the lineup matches the description of the perpetrator
17 provided by the eyewitness, it is a fair lineup. You don't
18 need anything else.

19 **Q.** All right. And will a high-confidence identification
20 with a fair lineup be accurate, or highly accurate?

21 **A.** Those tend to be highly accurate, yes, on the first
22 test of the witness's uncontaminated memory.

23 **Q.** All right. And when a witness is asked to make a
24 composite before they are shown a photo array, what's the --
25 what's the impact of preparing a composite on that ability of

1 the witness to make an accurate identification at the photo
2 lineup?

3 A. There's been some new science on that, very recent,
4 sort of contradicting what I previously believed to be true.
5 I thought that making a composite does have an effect on the
6 witness's ability to make an identification, an accurate
7 identification from a lineup. It turns out actually that
8 that's probably not the case.

9 It looks like when you factor in the latest research,
10 and there's a new review of the literature on this exact
11 question that came out in 2020 that concludes that contrary
12 to what I thought was true, based on one paper that had been
13 published earlier -- it turns out if you factor in all the
14 papers, all the studies that have looked into this exact
15 question, there's really no evidence that it has any effect
16 on the accuracy of an identification made from a lineup. I
17 didn't realize that before, but that is the current thinking
18 in the field.

19 MR. OWENS: Objection. We'd ask that to be
20 stricken. That's undisclosed. There was no supplemental
21 report in 2020, 2021. This is the first time we're hearing
22 this.

23 THE COURT: Well, I'll rule on that when we come
24 back.

25 Counsel, we're going to have to -- pursuant to my

WIXTED - DIRECT (McLandrich)

1451

1 schedule, we're going to have to break for approximately 35
2 minutes, and then we'll reconvene for the purposes of
3 testimony at that time.

4 BY MR. McLANDRICH:

5 Q. So, Doctor, we're going to take a brief lunch break for
6 about a half hour, and then we will reconvene with you.

7 A. Sounds good.

8 Q. Thank you, Doctor.

9 THE COURT: Ladies and gentlemen, please remember
10 the Court's admonitions. We will see you back here in 35
11 minutes. Thank you.

12 THE COURTROOM DEPUTY: All rise. This court stands
13 in recess.

14 (Jury out at 11:59 a.m.)

15 (Recess at 12:00 p.m.)

16 (Jury in at 12:37 p.m.)

17 (In open court at 12:38 p.m.)

18 THE COURT: We are back on the record.

19 Doctor, you can hear me?

20 THE WITNESS: I can.

21 THE COURT: Please remember you're still under oath.
22 Counsel ready to proceed?

23 MR. McLANDRICH: Yes, sir, Your Honor.

24 MR. OWENS: Yes, Judge.

25 THE COURT: The Court's going to sustain the last

1 objection and strike the previous answer.

2 Proceed.

3 BY MR. McLANDRICH:

4 **Q.** Thank you for your patience, Doctor.

5 Would you explain to the jury, please, what blind or
6 double-blind administration of a photo array is.

7 **A.** A blind administration of a photo array, that means
8 that the officer administering the photo lineup does not
9 even know who the suspect is.

10 **Q.** And what does the research show with respect to whether
11 blind or double-blind administration is important to the
12 accuracy of an eyewitness identification?

13 **A.** There's very limited research on that specific
14 question, and doesn't have any conclusive answer. The
15 rationale for recommending that is mainly based on many
16 other lines of research having nothing to do with eyewitness
17 identification but showing that, you know, a researcher's
18 expectations, for example, can influence the outcome of a
19 study. And so you want to make sure that the person running
20 the actual study hands-on, collecting data from subjects
21 doesn't know what the hypothesis is.

22 And because we know that, you know, people can be
23 unconsciously biased to -- to influence the performance of
24 the subjects in the experiment, it's better that that
25 researcher just doesn't know what the hypothesis is;

1 similarly, because of effects like that, since similar sorts
2 of things can happen in a police lineup, it's just best that
3 the police officer doesn't know who the suspect is. And
4 that way the police officer cannot possibly unconsciously
5 provide a clue to who the suspect is or unconsciously steer
6 the witness to pick the suspect. That potential problem
7 just goes away when you have a blind administrator.

8 **Q.** And does the research show any differential between
9 whether the blind administrator is presenting a sequential
10 array versus an array where all the pictures are shown
11 simultaneously?

12 **A.** Well, it's especially important for a sequential
13 procedure in which the photos are shown one at a time,
14 because under those conditions, the officer knows exactly
15 who the witness is looking at. And so the officer who's not
16 blind will know exactly when the witness is looking at the
17 suspect, the one the officer thinks might be guilty. And so
18 it's especially important for that to be administered by a
19 blind officer.

20 But in a simultaneous lineup, it's not as easy for the
21 officer to tell who the witness is looking at, when the
22 witness is casting eyes on the suspect. And so it's harder
23 to have an influence.

24 But it's not a bad idea to have a blind administrator
25 in both cases.

1 Q. And was blind administration part of the social science
2 recommendations in 1990?

3 A. No. Did you ask were those part of the
4 recommendations? Was the recommendation to use a blind
5 administrator made as of 1990, was that your question?

6 Q. Essentially, yes, sir.

7 MR. OWENS: Objection. Made by whom? I'm a little
8 bit unclear.

9 THE COURT: Made by the -- can you clarify your
10 question?

11 MR. McLANDRICH: Sure.

12 BY MR. McLANDRICH:

13 Q. Was a recommendation for blind administration made by ID
14 researchers in 1990, or was it later?

15 MR. OWENS: Objection to the leading.

16 THE COURT: Overruled.

17 You can answer.

18 THE WITNESS: Okay. So the recommendations are made
19 by a group of scientists who are commissioned to write a
20 consensus statement about what the science-based
21 recommendations are. And such recommendations were first made
22 in 1998 and were never made prior to 1998.

23 BY MR. McLANDRICH:

24 Q. Thank you. And what's the effect of pre-identification
25 instructions on the accuracy of an eyewitness identification?

1 A. Well --

2 Q. Let me rephrase.

3 A. I will start you --

4 Q. Just let me rephrase.

5 A. Okay.

6 Q. If a witness is given instructions that the suspect may
7 or may not be present in the photo array, what's the impact on
8 the accuracy of the eyewitness identification?

9 A. Just a small clarification. There's always a suspect
10 in the array. So the statement is that the perpetrator may
11 or may not be in the lineup, and that's a statement of
12 truth. And when you ask what is the effect of that, you
13 have to ask compared to what. So compared to not giving
14 them instruction? There's minimal to no effect, based on
15 the research that's been conducted to date, but sometimes
16 it's compared to an alternative instruction where the police
17 officer says the perpetrator is in the lineup and we need
18 you to pick him.

19 Now, there's a difference in those two sets of
20 instructions, with the latter instruction that I just
21 mentioned is called biased instructions. That strongly
22 encourages a witness to make an ID whether or not anybody in
23 the lineup matches their memory very strongly.

24 So when you ask that question, it has to be compared to
25 what.

1 **Q.** Thank you. And I believe you talked earlier about the
2 first identification that a witness makes of a suspect. If
3 you would, please, describe to us in the research the
4 importance of that first identification.

5 **A.** Okay. Well, I mentioned earlier that eyewitness memory
6 is not special in that it can be contaminated just like any
7 kind of forensic evidence can be contaminated. And so what
8 you want is the results of a test of uncontaminated memory
9 evidence.

10 And memory can be contaminated even before the very
11 first lineup, but that minimizes -- by focusing on that
12 first test, it minimizes the chances that the witness's
13 memory's been contaminated. That's the first point.

14 And the second point is the very act of testing a
15 witness's memory with a photo lineup unavoidably,
16 irretrievably changes the witness's memory. And so now it's
17 a different memory from that moment forward. And so you
18 don't want to test their memory again because you just
19 changed it by testing it. Instead, you want to focus on
20 what they say when given that first lineup test. If, as an
21 example, the suspect in the lineup may be guilty, may be
22 innocent. Let's assume just for illustration that the
23 suspect's innocent. What that means is that the witness is
24 looking at that face and maybe making a decision like, maybe
25 it's him. Could be him. I'm not sure. That's a low-

1 confidence identification. It's not telling you anything
2 even though the witness landed on the suspect. It's like a
3 coin flip.

4 But when making a decision about that face, looking at
5 it and making a decision, that face is activating space
6 processing regions in the witness's brain and laying down a
7 memory record of that face. That innocent -- if it's an
8 innocent suspect, that face wasn't in the witness's brain
9 before the lineup. That face is now in the witness's brain.

10 And so, in that sense, their memory has been changed,
11 and it generally does not make sense to test their memory a
12 second time. It's important to focus -- because now their
13 memory's been contaminated by the test itself. So focus --
14 the recommendation is to focus on the first uncontaminated
15 test of a witness's memory.

16 **Q.** And how does that correlate with the in-court
17 identifications that happen at a trial?

18 **A.** So whereas the first test is a test of minimally
19 contaminated eyewitness memory, in court is a test of
20 maximally contaminated memory. And the witness is unaware
21 that their memory has changed. And often -- well, I should
22 say there are many cases where the witness sat in trial and
23 confidently misidentified an innocent defendant.

24 Honestly, by that time the defendant did match their
25 memory very well, and so they're now highly confident that's

1 the person who committed the crime, but they're
2 misidentifying an innocent defendant. This is something --
3 and so in court, it's an immediate, high-confident
4 misidentification because the face is matching memory so
5 well.

6 This sort of thing has almost never been documented on
7 an initial test of memory. Virtually no examples where a
8 witness -- has been documented where a witness looked at an
9 innocent suspect in a photo lineup and immediately said I'm
10 positive that's him. And that makes perfect sense, but that
11 doesn't happen on the first test because if it's an innocent
12 person, that face does not -- an innocent person and a test
13 of uncontaminated memory, that face in the lineup does not
14 match the face of the perpetrator in their brain. Why would
15 an innocent suspect match -- who is not the perpetrator --
16 match their memory of a perpetrator if their memory has not
17 been contaminated by the time of that first test.

18 **Q.** And this distinction that you've just described between
19 the accuracy of the first memory test and the contaminated
20 memory test that happens in an in-court identification, when
21 did this realization come into the social science, if you
22 will?

23 **A.** So it was a consequence of the appreciation, the
24 growing appreciation that there's something special about
25 the first test. And, remember, not so long ago it was

1 controversial to say that eyewitnesses are reliable on the
2 first -- sorry, excuse me -- that eyewitnesses when they
3 make a suspect ID do so with high accuracy on a first test.
4 That was, until recently, a very controversial statement.
5 But once it became clear based on the data out there, it
6 became clear that there's something special about that first
7 test, which really started to emerge in the year 2015 and
8 was only cemented in year 2017, fairly recently. Only then
9 did it become further clear that what's happening is not
10 that they're making mistakes when their uncontaminated
11 memory is tested. What's happening is they are making
12 mistakes because their memory's being contested again, after
13 it has been changed by that first test and by many other
14 things can change their memory.

15 And that led to a consensus -- a new consensus
16 recommendation, for the first time, as in year 2020.

17 **Q.** And is the current recommendation that it be the first
18 memory test that's relied upon as opposed to an in-court
19 identification?

20 MR. OWENS: Objection. Well, I'll withdraw it.

21 THE COURT: Thank you. You may answer.

22 THE WITNESS: That is -- okay. That is the
23 recommendation if the goal is to get accurate information from
24 the witness's memory. If that's the goal, then it's best
25 served by focusing on the first test early in the police

1 investigation, not the last test in a court of law.

2 BY MR. McLANDRICH:

3 Q. And as we've previously discussed, that photo lineup is
4 the first test?

5 A. Normally, it is -- it is normally the first test that
6 is conducted early in a police investigation that minimizes
7 the chances of testing contaminated memory.

8 Q. And when police historically would show witnesses photo
9 books and have them look through books of photographs, does
10 that contaminate their memory?

11 A. Well, that's the first test, and it does change/
12 contaminate their memory. So if the suspect who's later
13 going to appear in a photo lineup was seen in the mug book,
14 then what they said, it's the mug book test that you should
15 put your eyes on.

16 Just looking at mug book photos doesn't necessarily
17 contaminate their memory if none of those photos are going
18 to show up in a police lineup as a suspect. But if the
19 suspect that's going to show up in the lineup was previously
20 viewed by the witness and the witness said something about
21 that photo and looked at that face, processed that face and
22 maybe said it kind of looks like that guy, that's the first
23 test. That's the uncontaminated test.

24 Does that make sense?

25 Q. Yes, sir. And so if the suspect who later appears in a

1 photo array is not in the mug book, then showing the mug book
2 is not a contamination to their memory for the later lineup.
3 Am I understanding you correctly?

4 **A.** Yes, that's correct. It's seeing the suspect's face
5 previously that puts that face into their memory and
6 contaminates their memory for that suspect. But if that
7 suspect wasn't seen in the mug books, no, memory has not
8 been contaminated by looking at those photos, mug book
9 photos.

10 **Q.** And what, if any, correlation is there between
11 description accuracy that a witness might give and the
12 accuracy of a later eyewitness identification in a photo
13 array?

14 **A.** Not much at all. There's a small relationship in lab
15 studies, but the more realistic, the more real-world like
16 the lab studies are, the less of a connect -- any connection
17 there is. There's no connection that's been identified from
18 the more realistic lineup studies between the description
19 and the later identification accuracy.

20 **Q.** And so if I understand you correctly, if a witness gives
21 an inaccurate description, it won't affect their ability to
22 later make an accurate identification on that first memory
23 test, being the photo array?

24 MR. OWENS: Objection to the form of the question.
25 It's leading, and I think it misstates the testimony.

1 THE COURT: I don't know whether he was -- are you
2 quoting testimony?

3 MR. McLANDRICH: No, I wasn't. I think he's
4 referring to the doctor's testimony.

5 MR. OWENS: I think he was summarizing in a way that
6 was different than what the doctor just said.

7 THE COURT: Try again, Counsel.

8 MR. McLANDRICH: Sure, Your Honor.

9 BY MR. McLANDRICH:

10 Q. If a witness gives an inaccurate description, can they
11 still make an accurate identification on that first memory
12 test?

13 A. I would say that follows from the finding that there's
14 no relationship between description accuracy and later
15 eyewitness identification accuracy from a photo lineup.

16 Q. And when you talk about high confidence, how is that
17 expressed by a witness?

18 A. Well, sometimes they actually give a number on a 1 to
19 10 scale or a 1 to 100 scale. More often, it's the words
20 they use. And really, although scientists have looked at
21 those words, what they have found is pretty much what you'd
22 expect. Words like "That's him," or "I'll testify in court
23 that's him," "A hundred percent sure," "I'll never forget
24 that face," words like that correspond to high confidence.
25 Words like "It looks most like him," "It might be him," "I

1 think it's him but I'm not sure," that's -- those are
2 indications of low confidence.

3 **Q.** Has there been recent research with respect to the
4 importance of how quickly the witness is able to make the
5 identification?

6 MR. OWENS: Objection with respect to "recent." I
7 hope it's disclosed.

8 THE COURT: Is it within the part of his report?

9 MR. McLANDRICH: That's a good question.

10 I'll withdraw it. That's fine.

11 THE COURT: Thank you.

12 BY MR. McLANDRICH:

13 **Q.** If a witness has made a high-confidence identification
14 under appropriate conditions, is the later court testimony
15 simply a recitation of their prior high-confidence
16 identification?

17 MR. OWENS: Objection; foundation.

18 THE WITNESS: Yes.

19 THE COURT: I'm going to allow it. Overruled.

20 THE WITNESS: Yes.

21 BY MR. McLANDRICH:

22 **Q.** And if that witness is required to testify more than
23 once, is the second court appearance and testimony essentially
24 just a recitation of the prior high-confidence identification?

25 MR. OWENS: Same objection.

1 THE COURT: Overruled.

2 You can answer.

3 THE WITNESS: Yes.

4 BY MR. McLANDRICH:

5 Q. Thank you, Doctor. Those are the questions I have for
6 you today.

7 THE COURT: Thank you, Counsel.

8 Doctor, you're now on counsel for plaintiff will be
9 asking you some questions.

10 THE WITNESS: Okay.

11 **CROSS-EXAMINATION**

12 BY MR. OWENS:

13 Q. Dr. Wixted, good to see you again. Can you hear me all
14 right?

15 A. I can.

16 Q. Now, in this case, you read a report authored by
17 Dr. Jennifer Dysart, correct?

18 A. Correct.

19 Q. And you and Dr. Dysart actually agree a lot about some of
20 the science in the field and opinions in this case, correct?

21 A. I'm not sure I would characterize our level of
22 agreement in those exact terms, but we agree about some
23 things and disagree about other things.

24 Q. All right. Well, let's start with the list of things
25 where we can find out where y'all agree, okay?

1 A. Okay.

2 Q. First, you agree that if three eyewitnesses select the
3 wrong innocent person, the probability of that happening,
4 absent suggestion or contamination, is extremely low, correct?

5 A. As a general rule, I would say that's correct.

6 Q. Well, you stated in your second report in this case,
7 quote -- well, that -- well, I'll take away the quote, but you
8 said in your second report that on the assumption that a
9 suspect is innocent, there is a very low probability that
10 three eyewitnesses would select him as the perpetrator unless
11 some suggestion, bias, and/or administrator influence
12 occurred, correct?

13 A. That sounds like something I would write.

14 Q. All right. So, second, another thing that you and
15 Dr. Dysart agree about is that the scientific-based guidelines
16 for preparing identification procedures are that the suspect
17 shouldn't stand out, correct?

18 A. Correct.

19 Q. A third thing that you and Dr. Dysart agree about is that
20 a lineup can be fair or biased, and a biased lineup can lead
21 to an inaccurate identification, correct?

22 A. Yes. Depending on which kind of biased lineup we're
23 talking about, yes.

24 Q. So, for example, in studies that you've written and
25 yourself cited in your papers, you talk about DNA-based

1 exonerations and as examples of individuals in which there's
2 been an inaccurate identification, correct?

3 **A.** Are you still on the topic of biased lineups, or are
4 you just switching to something else? I didn't hear any
5 mention of lineup. So I am just making sure that we're not
6 talking about biased lineups now.

7 **Q.** Well, let's just take a step back. In the literature
8 that you have written about discussing fair and biased
9 lineups, you discuss what we've learned from DNA-based
10 exonerations, correct?

11 **A.** I guess that's correct, although I'm puzzled a little
12 bit just because I don't remember making a direct connection
13 between those two things in my writings about those two
14 things. But maybe I'm just forgetting something.

15 **Q.** Okay. So on direct examination, do you remember that you
16 mentioned a paper that you wrote with Gary Wells? Do you
17 remember being asked about that?

18 **A.** Yes.

19 **Q.** And I believe -- and I'm trying to just refresh myself
20 with your exact quote -- but you said something to the effect
21 of, you know, it was a paper that was very path-breaking or
22 one of the most impactful papers in recent memory, correct?

23 **A.** Correct.

24 **Q.** And you didn't say the title, but I want to make sure
25 we're on the same page. Was that the 2017 paper that you

1 wrote with Gary Wells called *The Relationship Between Witness*
2 *Confidence and Identification Accuracy: A New Synthesis?*

3 A. Yes.

4 Q. And on page 1, paragraph one of the introduction of that
5 paper begins by discussing the fact that since 1989, there
6 have been 349 wrongful convictions overturned through DNA and
7 that eyewitness misidentification played a role in over 70
8 percent of those cases, far more than any other contributing
9 cause, correct?

10 A. Correct.

11 Q. All right. And in this most impactful paper, you also
12 talk about fair and unfair lineups, correct?

13 A. Correct.

14 Q. And in that paper, you discuss that unfair lineups can
15 increase confidence with which eyewitnesses make a mistaken
16 identification, right?

17 A. Yes. My own research shows that to be true.

18 Q. And so if there is an unfair lineup, according to your
19 own research, the unfair lineup undermines our ability to
20 infer high accuracy from high confidence, right?

21 A. Yes, if it's unfair in the sense that I described
22 earlier. There's more than one way in which people talk
23 about a lineup being unfair, one of which I am talking
24 about, the other of which I am not talking about. But, yes.

25 Q. Sure. Let's just put it in more simple terms. As I

1 understand it, if there's an unfair lineup in the way that you
2 define an unfair lineup, that witnesses can still make a
3 high-confidence identification but it doesn't necessarily
4 correlate to it being accurate, right?

5 A. It's still the case that a high-confidence ID is
6 considerably more accurate than a low-confidence ID, even
7 for an unfair lineup. However, the accuracy of a high-
8 confidence-identification of the suspect is no longer -- you
9 know, I'll just use a number as an example. It's no longer
10 95 percent correct, something very high. It's considerably
11 lower than that.

12 Q. Right. So I'm sure we can't get into percentages, but at
13 the end, an unfair lineup runs a much higher overall rate of
14 mistaken identifications of the innocent, correct?

15 A. Correct.

16 Q. And the fourth thing that you and Dr. Dysart I think
17 agree about is that one type of unfair or biased lineup that
18 can lead to an inaccurate identification is if the features of
19 the suspect match the witness memory of the perpetrator better
20 than the fillers, right?

21 A. I missed the very end of your question. Could you
22 repeat that?

23 Q. Not a problem. So a fourth thing that you and Dr. Dysart
24 agree on is that there is one type of lineup bias that could
25 lead to an inaccurate identification even with high confidence

1 is that if the features of the suspect match the witness
2 memory of the perpetrator better than the fillers, right?

3 **A.** Well, just to clarify. A high-confidence
4 identification can be inaccurate even under the best of
5 circumstances. What we're talking about in science is the
6 probability of it being accurate, and that probability is
7 really quite high in an unbiased lineup and is lower in the
8 kind of lineup that you just referred to, where the suspect
9 matches the witness's description of what's in his or her
10 brain better than the fillers do, yes.

11 **Q.** Right. And so one of the examples you gave on direct
12 examination about an unfair lineup is if you had the 20-year-
13 old white suspect and then -- as a suspect, and then the rest
14 of the guys are all black dudes as fillers, right?

15 **A.** Right.

16 **Q.** Okay. So another type of unfair lineup, you would agree,
17 would be if the witness described the perpetrator as having a
18 certain eye color and the suspect is the only one or -- to
19 have that eye color, correct?

20 **A.** So you're saying if in the photo lineup you can see
21 that the suspect has blue eyes and you can see that the
22 other members of the lineup have, say, brown eyes, if that's
23 true, then, yeah. If the photo lineup is clear enough that
24 you can tell blue eyes versus other color eyes, I would say
25 yes.

1 Q. Got it. And do you agree -- we're on Number 5 -- is that
2 it's the photos themselves that can also create an unfair
3 lineup so long as there's a second biasing mechanism, right?

4 A. I'm sorry. I don't understand that question. Can
5 you --

6 Q. Absolutely.

7 A. -- restate it.

8 Q. I apologize. So you agree that a suspect can stand out
9 when it relates to the nonfacial features, the picture itself,
10 right?

11 A. Yes. So I think you are referring to the fact that the
12 perceptual features of the picture itself -- the size of the
13 faces, the background, the clothing, something like -- that
14 can be perceptually different for the suspect versus the
15 rest of the lineup. I think that's what you're talking
16 about.

17 Q. That's exactly right. And in order for you -- for that
18 to be an unfair lineup, there needs to be another biasing
19 mechanism, like a comment by a police officer, "We got a
20 suspect," something like that, right?

21 A. Well, I mean, I'm happy to call that a problematic
22 lineup, not because it's been shown to have any influence on
23 what a witness does, even though it seems like it might be
24 giving the witness a clue. It's -- you know, the
25 recommendation is that that shouldn't be the case. Because

1 it just creates this question that people are going to be
2 wondering about even though the research that's available
3 indicates that that really isn't much of an issue at all
4 compared to the other way of biassing lineups.

5 Q. Got it. Let me --

6 A. Where the -- okay.

7 Q. Sorry. Go ahead. Finish. I didn't mean to interrupt.

8 A. I was just going to say compared to the other way of
9 biassing a lineup, where the witness tells you what's in his
10 or her memory and only the suspect matches it. That's by
11 far the more important consideration in whether a lineup is
12 biased in a way that's going to influence what the witness
13 does or not.

14 Q. Okay. And I want to just step back for a second. On
15 direct examination you mentioned that there was a consensus
16 document commissioned and contributed to that had been
17 published in 1998. Do you recall that?

18 A. Yes.

19 Q. And that was a white paper. Is that what it was called?

20 A. Yes.

21 Q. And white paper's kind of a big deal, not the normal type
22 of thing that you publish regularly, right?

23 A. Right. Because regularly we are doing the opposite.
24 We're challenging each other and arguing with each other
25 because that's our job as scientists. But at some point,

1 you need to get together and say will you agree, and that's
2 what makes those papers special, yes.

3 Q. Got it. And so there was an update to the 1998 white
4 paper, consensus document, where everybody got together to
5 agree, and you participated in that, right?

6 A. I did.

7 Q. And one of the consensus recommendations on that document
8 was that the physical characteristics of the fillers are not
9 the only factors that can make the suspect stand out in a
10 lineup. Instead, in photo lineups, the background of the
11 photos, the size or brightness of the images, and the source
12 of the photo can make the suspect's photo stand out from the
13 others. Correct?

14 A. Yes. This is undeniably true.

15 Q. Okay. Thank you. So another area, you were asked on
16 direct examination about biased administrators and blind
17 versus non-blind administration of a lineup. Do you recall
18 that?

19 A. Yes.

20 Q. Now, you agree with the recommendation in the white paper
21 that there be non-blind administration of a photo lineup,
22 correct?

23 A. I strongly -- wait. Sorry.

24 Q. No problem.

25 A. Can you repeat that question?

1 Q. Yes. Do you agree with the recommendation in the white
2 paper that you contributed to that lineups should be conducted
3 with blind administration?

4 A. Yes, I strongly agree with that.

5 Q. Okay. And do you agree that there is evidence that
6 lineup administrators -- the police officers conducting the
7 lineups -- can influence witnesses' confidence even when the
8 administrators are given an unbiased script that they are
9 supposed to follow?

10 A. That can -- there is research showing that that can
11 happen verse -- or that that does happen. What was your
12 question?

13 Q. I'm just asking if you agree with that statement.

14 A. Yeah, I wasn't sure if you said that that can happen or
15 that that does happen in practice. I'm just asking for
16 clarification of what you were asking me.

17 Q. Okay. I see. I was just quoting the white paper. Do
18 you recall that we were just discussing that?

19 A. Yes.

20 Q. Okay. Which states that there is evidence that lineup
21 administrators influence witness confidence even when the
22 administrators are given an unbiased script that they were
23 supposed to follow.

24 A. Yes.

25 Q. And you sort --

1 **A.** Did we say that in the white paper? Was your question
2 did we say that in the white paper, and do I agree with it?
3 And if that's -- those are the questions, yes and yes. We
4 said it, and I agree with it.

5 **Q.** Sure. And just to go back a little bit to direct
6 examination, you mentioned that administrator bias, aka, by
7 the police officer, can happen consciously, but it can also
8 happen inadvertently too, right?

9 **A.** Yes.

10 **Q.** And one of the ways -- we're on Number 7 -- that
11 non-biased administrators or police officers can influence
12 witnesses is, for example, by the things that they say to a
13 witness before the lineup is conducted, right?

14 **A.** Right.

15 **Q.** All right. So one of the things that you have brought to
16 the field of eyewitness discussion and memory is your
17 experience in cognitive science and memory, right?

18 **A.** Right.

19 **Q.** And one of the things that you have talked about in this
20 2017 path-breaking paper is about pristine conditions, right?

21 **A.** Correct.

22 **Q.** And I just want to make sure that we're on the same page
23 about what those are. Those are that you got to only include
24 one suspect per lineup, right?

25 **A.** Right.

1 Q. The suspect should not stand out in the lineup, right?

2 A. Right.

3 Q. Three, you got to caution that the offender may not be in
4 the lineup, right?

5 A. Right.

6 Q. Four, you got to use double-blind testing, right?

7 A. Right.

8 Q. And, five, it's important to collect a confidence
9 statement at the time of the identification, right?

10 A. Definitely.

11 Q. And so confidence is an unmalleable thing in witnesses,
12 right?

13 A. It is.

14 Q. And because of that, you want to make sure you have
15 pristine conditions so you don't contaminate a witness's
16 memory, right?

17 A. Yes, that minimizes the chances of that happening.

18 Q. For sure. And another way to minimize the chance of that
19 happening would be to require objective evidence of guilt
20 before even putting a person in a lineup that might
21 contaminate their memory, right?

22 A. Yes. I think we usually put it as that the officer
23 should be able to articulate their reason for believing that
24 that might be the guilty person, you know, some evidence
25 that that person might be guilty, yes. I think the short

1 answer is yes.

2 **Q.** Right. And the way that you put it in your peer-reviewed
3 published papers is that one way to reduce bias is to have
4 objective evidence of guilt before placing a suspect in a
5 lineup, correct?

6 **A.** Reducing bias, did you say? I'm not sure that this is
7 connected with bias lineups. This is -- this refers to the
8 base rate of guilt.

9 So, for example, if you just randomly pick people off
10 the street who match the description and put them in
11 lineups, you would almost always have an innocent person in
12 the lineup. And so then, in that case, any suspect
13 identification would be of an innocent person because you
14 are just making lineups of innocent people. That's what's
15 important.

16 You don't just match the description. There also has
17 to be some, you know, some reason to believe this might be a
18 person who not only matches the description but also may
19 have committed the crime. For example, he's got a history
20 of committing similar crimes in that neighborhood and he
21 fits the description. So it makes sense to put him in a
22 lineup and see if the witness recognizes that individual.
23 That's the best way to do it.

24 **Q.** Thank you. And so you say is if we have these pristine
25 conditions, then high confidence can tell us a lot about

1 accuracy, right?

2 A. Yes.

3 Q. Okay. If you have a suspect who's been misidentified,
4 who is innocent, does that suggest to you that it's unlikely
5 that pristine conditions were used?

6 MR. McLANDRICH: Objection.

7 THE COURT: Rephrase your question.

8 MR. OWENS: Yes, Your Honor.

9 BY MR. OWENS:

10 Q. If you assume that somebody is innocent but was
11 mistakenly identified, that provides you a strong indication
12 that pristine conditions were not used, right?

13 A. Let me think about that for a second. I mean, such
14 errors can occur. Remember, I am not saying that high
15 confidence is infallible. So even under pristine
16 conditions -- I use the number 95 percent credit just
17 because in our studies it often comes out to be about that
18 number. There's -- 5 percent of the time they're making a
19 mistake, even under pristine conditions.

20 So, for example, if the police only use pristine
21 conditions and you came to me and said there's this innocent
22 person who was misidentified with high confidence, does this
23 mean that they use nonpristine procedures? It doesn't
24 necessarily mean that.

25 So I don't know. I haven't reasoned the backwards in

1 that way. I haven't thought through reasoning backwards.

2 THE COURT: Hold on. Counsel, can you approach.

3 (At sidebar off the record.)

4 THE COURT: Ladies and gentlemen, we're going to
5 break for about five minutes, five minutes. So we'll
6 reconvene in five minutes. Thank you.

7 THE COURTROOM DEPUTY: All rise. This court stands
8 in recess.

9 (Jury out at 1:20 p.m.)

10 (Recess at 1:20 p.m.)

11 (Jury in at 1:29 p.m.)

12 (In open court at 1:29 p.m.)

13 THE COURT: We're back on the record. Counsel.

14 MR. OWENS: Thank you, Judge.

15 BY MR. OWENS:

16 Q. Dr. Wixted, can you still hear me?

17 A. I can.

18 Q. Great. So just to refresh, we were talking about
19 pristine conditions, and I think there's no disagreement about
20 what those are between you and Dr. Dysart, right, that you're
21 aware of?

22 A. Right.

23 Q. And that what I was just asking was that in the absence
24 of pristine conditions, the error rate of identification goes
25 up, right?

1 A. No.

2 Q. Okay.

3 A. The absence -- sorry. In the absence of certain
4 nonpristine factors, such as one we've already talked about,
5 an unfair lineup in the sense that I've described, that
6 changes the accuracy of even a high-confidence
7 identification. Certain ones.

8 Q. Got it. But the -- sort of the take-home message from
9 your big 2017 paper with Gary Wells was that you need these
10 pristine conditions. If they are met, then that tells us a
11 lot about accuracy, correct?

12 A. Correct.

13 Q. And if you have an unfair lineup, that take-home message
14 doesn't apply, correct?

15 A. An unfair lineup in the sense that I described,
16 correct.

17 Q. And, in fact, that you state if there's an unfair lineup
18 in the sense in which you've described, it would be a mistake
19 to assume that a high-confidence initial ID is highly
20 accurate, even when there is an unfair lineup that is used,
21 because that would be a recipe for wrongfully convicting the
22 innocent?

23 MR. McLANDRICH: Objection. It was an
24 unintelligible question from my perspective.

25 MR. OWENS: I can rephrase.

1 THE COURT: I think there's about three questions in
2 there.

3 MR. OWENS: My apologies, Your Honor. I'll
4 rephrase.

5 BY MR. OWENS:

6 Q. Let me just ask you this: In your 2017 very important
7 paper, you wrote, with Gary Wells, that mistakenly assuming
8 that a high-confidence initial ID is highly accurate even when
9 an unfair lineup is used is a recipe for wrongfully convicting
10 the innocent, correct?

11 A. Yes, correct.

12 Q. You mention this a little bit on direct examination, so I
13 won't tarry on it for too long, but you and Dr. Dysart, Number
14 12 here, agree that an identification test itself contaminates
15 memory, right?

16 A. Right.

17 Q. And so because being asked to conduct -- to look at a
18 photo spread where there is a suspect, I think you described
19 on direct examination, that puts that person's face into that
20 person's memory, right?

21 A. Into the witness's memory, yes.

22 Q. Great. And I just wanted to focus on something that you
23 said on direct examination is that you can't, after that goes
24 in there, disentangle the initial memory that somebody had
25 from the scene itself from the identification procedure,

1 correct?

2 A. Would it be fair to say that you are asking me whether
3 it's possible to uncontaminate memory once you've
4 contaminated it? I understand your question to be asking
5 that.

6 Q. That's a better way -- sure. That's a better way of
7 phrasing it.

8 A. No, it is not possible to -- that's another way in
9 which eyewitness memory's like other forms of forensic
10 evidence: once contaminated, there's no way to
11 uncontaminate it.

12 Q. Or just more simply, once the -- once the ingredients go
13 into the stew, you can't separate them out later, right?

14 A. Right. That's a good analogy, I guess.

15 Q. Thank you. Next, you were asked about -- actually, I
16 want to skip ahead. But you indicated that, well, on direct
17 examination that the subsequent identifications in court can
18 be maximally contaminated, right?

19 A. Yes.

20 Q. And that -- I don't know how you get double maximally,
21 but one of the reasons that you recommend non-blind
22 administration is to prevent feedback after an identification,
23 correct?

24 A. Correct.

25 Q. And, in fact, that's one of the most important things

1 that you've written about where a lineup conducted in pristine
2 conditions, as you've defined them, you can still impact
3 negatively the process by having non-biased -- or biased
4 administrators, correct?

5 A. I'm sorry. I didn't quite understand that question.

6 Q. Sure. Let me ask it again.

7 As part of the recommendations that you make in your 2017
8 paper with Gary Wells, you talk about blind administration of
9 the photo arrays, correct?

10 A. Correct.

11 Q. All right. And then one of the pristine conditions is
12 not just about the photo array, but it's also getting a
13 confidence statement from somebody right after they view a
14 photo array, right?

15 A. Right.

16 Q. And you're so concerned about feedback that you want the
17 person taking the confidence statement after the fact to also
18 be a blind administrator, correct?

19 A. Yes. Ideally, it would be a blind administrator
20 recording that confidence statement. I think that's what
21 you're asking. And that's the ideal scenario, yes.

22 Q. Okay. Well, and let me just break it down in terms of
23 what you wrote in the white paper. In the white paper, am I
24 correct that you wrote, quote, "Two decades of research
25 supports the conclusion that providing feedback to witnesses

1 that they identified the suspect increases their confidence in
2 the accuracy of their decisions, especially among eyewitnesses
3 who have made a mistaken identification"?

4 A. Yes.

5 Q. And then, "The confirming feedback effect attenuates the
6 relationship between confidence and accuracy, rendering
7 witnesses' reports of their confidence useless for judging
8 their accuracy," correct?

9 A. Yes, that's why you want to focus on their confidence
10 before the feedback. And if you do that, it doesn't matter
11 if feedback happens because, yeah, it's going to be inflated
12 in that way. And by the time of court, they are going to be
13 certain that that's another factor that makes the courtroom
14 ID much less informative than the initial ID.

15 Q. And so if there is even more feedback given to a witness
16 after they've made the identification, that would be an even
17 greater risk when they walk into court, correct?

18 A. Correct.

19 Q. And I just want to be clear about this. I assume that
20 it's part of your opinions about what's in this case that when
21 we -- that we want to have accurate recording of a witness's
22 confidence statement and any other things that are said to the
23 witness before, during, or after the administration of a
24 lineup, correct?

25 A. Correct.

1 Q. Right. And so you want to know contemporaneous records
2 should include like whether or not a witness was able to make
3 an identification or if they said some kind of low-confidence
4 thing like you described earlier, "That kind of looks like
5 him," stuff like that, right?

6 A. Right.

7 Q. Now, you agree -- we'll move ahead.

8 Now, as -- from a scientific perspective, you focused on
9 the first memory test. But as you know, witnesses often get
10 called to court to talk about the identification procedures
11 itself, correct?

12 A. Correct.

13 Q. And it's true, isn't it, that when there is unfair
14 lineups or feedback provided to witnesses, that that
15 contamination can affect how they describe or report on what
16 they observed?

17 A. I'm not fully understanding your question.

18 Q. Okay. Let me rephrase. Do you agree that post-
19 identification feedback produces some type of distortion, not
20 just for retrospective confidence, but also for other
21 testimony such as self reports by witnesses, how much
22 attention they paid at the time, or how good their view was of
23 the perpetrator?

24 MR. McLANDRICH: Objection.

25 THE WITNESS: Yes.

1 THE COURT: He answered. I'm going to allow it.

2 THE WITNESS: Yes.

3 BY MR. OWENS:

4 Q. I'm skipping. Now, you agree that it's consistent with
5 the recommendations of the social science that witnesses must
6 not be allowed to consult with one another about their
7 identification either before, during, or after a photo spread,
8 correct?

9 A. Correct.

10 Q. Okay. Just a couple more questions, and I skipped some
11 of the ones that I have had to ask -- planned on asking you.

12 In your report in this case that was disclosed several
13 years ago, you indicated that the process of creating a
14 composite can contaminate memory, correct?

15 A. Correct.

16 Q. And that's also what you said again at your deposition,
17 that the possibility of a composite contaminating a witness's
18 memory is also greater when there's a large amount of time
19 that has passed between the event and creating the composite,
20 right?

21 A. Right.

22 Q. I want to return just for the -- one question you were
23 asked about on direct examination was about description
24 accuracy and the correlation between description accuracy or
25 the description and the accuracy of an identification. Do you

1 recall that topic?

2 A. I do.

3 Q. Okay. And I just want to make sure I heard you
4 correctly, 'cause I might not have. Did you say that there
5 was no relationship whatsoever between description accuracy
6 and the accuracy of a potential perpetrator identification?

7 A. I'm saying that's what has been reported in the
8 scientific literature when the study is conducted to be
9 realistic rather than as an artificial laboratory test.
10 That doesn't mean there is no relationship. It means that
11 science has not detected that relationship so far.

12 Q. Okay. And this came up in your report, a little back-
13 and-forth between you and Dr. Wixted about this Meissner
14 article from 2008, correct?

15 A. Yes, and there's been research on it since then as
16 well, but, yes.

17 Q. Okay. Well, let's just focus with what you cited in your
18 report. That's what I'm talking about, okay?

19 A. Okay.

20 Q. All right. The article that you cited in your report
21 indicates, quote, "Across 33 research papers and a total of
22 4,278 participants, our analysis found support for a
23 significant relationship between description accuracy and
24 identification accuracy as well as a relationship between the
25 number of incorrect descriptors recalled and identification

1 inaccuracy." Correct?

2 **A.** Are you aware of what they're referring to when they
3 say those words?

4 **Q.** Please just answer my question.

5 **A.** Well, it's relevant to what you're getting at, but
6 that's what they wrote, but it's important to be aware of
7 what -- the studies they're referring to when they say that
8 is all I'm saying, because that is not being consistent with
9 what I'm saying.

10 **Q.** Now, when we talk about description accuracy, and if you
11 assume that there is an innocent suspect that has been
12 misidentified, the mismatch between the description of the
13 perpetrator and that misidentified suspect would be
14 scientifically significant, correct?

15 **A.** Well, that's a vague question, because -- so, if
16 there's a mismatch between what the witness described and
17 then there is an innocent suspect in a lineup and the
18 witness picks that guy, what's most likely to be true is
19 that it's going to be an inconclusive identification.

20 So the witness is going to -- under such conditions,
21 it's usually the case that the witness is going to give some
22 indication of awareness of that discrepancy between the
23 person they described and the person they're picking in the
24 lineup.

25 **Q.** Okay. My question was a little bit different, which is,

1 if you assumed that the person is innocent and has been
2 misidentified, does the lack of consistency between the
3 description of the misidentified person and the original
4 description provided by the witness as a matter of social
5 science indicate to you that the identification is likely to
6 be inaccurate?

7 A. Well --

8 MR. McLANDRICH: Objection.

9 THE WITNESS: -- it has to be inaccurate because you
10 said assuming that the suspect is innocent, and so you
11 conditioned on it being a misidentification.

12 BY MR. OWENS:

13 Q. Okay. So, I guess, let me -- I appreciate the revision,
14 which is this: You would expect there to be a mismatch
15 between the -- well, let me ask it a different way.

16 The -- if you assume that an innocent suspect was
17 misidentified and -- actually, I'll just strike that.

18 Two other questions. You asked -- you testified on
19 direct examination about identifications as being a memory
20 match test, right?

21 A. Yes.

22 Q. Okay. And so what you meant by that was that somebody's
23 got a memory in their head. They look at some pictures. And
24 they're trying to figure out which one it matches, right?

25 A. Which one matches their memory of the perpetrator. Is

1 that what you mean?

2 **Q.** Correct.

3 **A.** Yes.

4 **Q.** And we already talked about it. If their memory's been
5 contaminated or corrupted, then that memory match process is
6 sort of broken, right?

7 **A.** Right. If it's already been contaminated by the time
8 of the all-important first test, even that first test is
9 problematic.

10 **Q.** Got it. And you don't know, as a matter of social
11 science from your research, whether when somebody makes --
12 somebody says, "Oh, it's this picture," whether or not they
13 are making a memory match or they are just choosing somebody
14 that might be the closest or something like that? There is no
15 research that gets inside of people's heads like that, right?

16 **A.** Well, I wouldn't go along with that, actually.
17 There's -- there are a lot of indicators that provide
18 information about the degree to which that face is matching
19 what's in the witness's memory of the perpetrator. We
20 talked about confidence, for example, and there is more than
21 just confidence, but confidence is one indicator.

22 If they pick with low confidence, they are telling you
23 it's not a great match. It's a somewhat match, but it's not
24 a great match, and that's why that's hardly giving you any
25 information that you're looking for. Whether it's an

1 innocent guy or a guilty guy, such that outcome has hardly
2 given you any information.

3 But if it's high confidence and memory hasn't been
4 contaminated, that means it's a strong match. Now, there's
5 a small chance that happened randomly, that the innocent
6 suspect just happens to look just like the guilty
7 perpetrator. That can happen. It's rare. But it,
8 nevertheless, does mean that that face matches the memory of
9 the perpetrator in my brain.

10 **Q.** And by contrast, on the flip side, is if you have got an
11 innocent person who's been misidentified, strong evidence that
12 there's been some contamination to that memory or unfairness
13 in the process, correct?

14 **A.** No. That's reasoning backwards again. I don't think
15 you can -- I mean, it happens even if everything's perfect.
16 You occasionally get a high confidence misidentification of
17 an innocent suspect. It's relatively -- it's rare under
18 perfect conditions, but it still happens. So the mere fact
19 that it happened -- I don't know. I'd have to think about
20 it. Again, I don't usually reason backwards like that, and
21 I haven't thought through that. So I wouldn't be prepared
22 to go there without thinking through it.

23 **Q.** Okay. Well, let's just end with a source of agreement.
24 You agree that if there's an unfair identification procedure,
25 the likelihood of there being a mistake in identification of

1 an innocent suspect goes up, right?

2 A. Unfairness in the sense that I described, yes.

3 MR. OWENS: No further questions.

4 MS. FRICK: No, none.

5 MR. McLANDRICH: Thank you, sir.

6 **REDIRECT EXAMINATION**

7 BY MR. McLANDRICH:

8 Q. So, Doctor, let's start sort of where we finished with
9 this cross-examination.

10 Since the issue of unfair lineup was brought up so many
11 times, again, what is your definition of an unfair lineup?

12 A. The suspect in the lineup matches the witness's
13 described memory of the perpetrator more so than the fillers
14 in the lineup.

15 Q. All right. But when a lineup is constructed, we're
16 trying to select people that are similar to the perpetrator to
17 make the lineup, quote-unquote, fair, correct?

18 MR. OWENS: Objection. I don't know who "we" is.

19 MR. McLANDRICH: People who are creating lineups.

20 THE COURT: With that clarification, you can answer
21 the question, Doctor.

22 Overruled.

23 THE WITNESS: Yes, that's what they're trying to do.
24 There has to be some degree of similarity.

25 BY MR. McLANDRICH:

1 **Q.** All right. So when you talk about a lineup that's
2 unfair, we're now talking about that degree of similarity
3 being so disproportionate -- or, I'm sorry. Let me start
4 over.

5 When you say an unfair lineup, you're talking about a
6 lack of similarity that is so high that now the lineup is,
7 quote-unquote, unfair, correct?

8 **A.** Yeah, it is so high that if I gave a random person the
9 witness's description, they'd be able to pick out the
10 suspect.

11 **Q.** Thank you.

12 **A.** Did you understand that?

13 **Q.** Yes, I believe I did.

14 **A.** Okay.

15 **Q.** Now, I just want to go through some of these things that
16 you were asked about. This concept that we've been talking
17 about and that you discussed on cross-examination about a high
18 confidence ID and the impact of these various issues, this is
19 all new science in the last, what? I think the paper you said
20 was 2015?

21 **A.** Yes. That's when we got the ball rolling on this
22 argument, and it was extremely controversial for a fairly
23 short period of time because it was such a dramatic shift in
24 thinking. But by the time of 2017 when Gary Wells wrote
25 that paper with me and people knew that we were not exactly

1 friends, we argued a lot, the fact that we came together and
2 made that statement and by reanalyzing -- we didn't present
3 new data.

4 We analyzed all the exact same data that has been out
5 there for many years that had convinced people otherwise.
6 We showed that when you analyze it the right way, the story
7 changes. And that sort of -- once Gary Wells and I both
8 made that argument in 2017, pretty much on a dime it changed
9 thinking in the field. Overturned decades of counterclaims.

10 **Q.** So certainly not information or science that a police
11 officer in 1990 could have known about or been held to?

12 **MR. OWENS:** Objection. This is excluded by the
13 Court.

14 **THE COURT:** Overruled. I mean, I'm sorry.
15 Sustained, sustained.

16 **BY MR. McLANDRICH:**

17 **Q.** When you were asked about the DNA exoneration cases, what
18 was the impact of high confidence versus low confidence
19 identifications with respect to those DNA exonerations?

20 **A.** Well, that's one line of evidence. And other lines of
21 evidence had already converged on the notion that
22 eyewitnesses should not be making very many high-confidence
23 misidentifications on the first test. And then, when we
24 looked at the DNA exoneration cases where a witness got on
25 the stand and confidently misidentified an innocent person,

1 when we looked at those cases -- a law professor named
2 Brandon Garrett did this -- there was trial testimony in
3 many of those cases about the initial, the all-important
4 initial identification.

5 And the amazing thing, in every single case where there
6 was -- where there was trial testimony, there wasn't always
7 information about the initial test, but in every case where
8 there was -- and there were 92 such cases -- every single
9 one of them, the initial identification was something other
10 than a high-confidence identification of a suspect,
11 something other than what happened in a court of law later
12 on. It was made with low confidence, or it was a filler ID,
13 or the lineup was rejected.

14 It was only later, after the witness -- and that's how
15 it ought to be. Multiple, additional lines of evidence
16 suggest that it should be that way. And when those results
17 became clear, I mean, everything just came together.

18 **Q.** You were asked earlier about -- when you were discussing
19 blind administration, that there could be inadvertent
20 influence to the identification. Do you recall that?

21 **A.** I do.

22 **Q.** And so inadvertent influence would not be something that
23 was done knowingly, correct?

24 **A.** Correct.

25 **Q.** Are pristine conditions generally present in the real

1 world?

2 MR. OWENS: Objection.

3 THE COURT: Well, wait a minute.

4 Overruled. He can answer it if he knows.

5 Can you answer that, Doctor?

6 THE WITNESS: I can. There's been surveys of police
7 department practice by scientists that speak to this issue.

8 No, I would say pristine conditions remain the exception
9 rather than the rule.

10 BY MR. McLANDRICH:

11 Q. And so then the bottom line is that if we want to know
12 whether an eyewitness identification is accurate, we're
13 focused on an initial memory test, the first memory test, and
14 it being performed with high confidence, correct?

15 A. Yes, that's the most important thing, and we've learned
16 that, as I mentioned a moment ago, from multiple lines of
17 research, even in the DNA contamination cases where those
18 also did not involve pristine lineup conditions.

19 Pristine lineup conditions are ideal and recommended
20 strongly, but even if you don't have them, it's rare that
21 you get a high confidence -- so far, based on all the
22 evidence that's available, it's rare that you get high-
23 confidence misidentification on the initial test.

24 Q. And the accuracy rate for such high-confidence
25 identifications approaches what level, sir?

1 **A.** Well, I have to answer that question with respect to
2 what we find in our studies. In the real world, it's who
3 knows. But in our studies and lab studies where we conduct
4 what we call mock crime studies -- not a real crime, it's a
5 mock crime. The witnesses aren't real witnesses; they're
6 participants in the study -- but in those, we averaged
7 across all the studies, those kind of studies, a high-
8 confidence identification is on the order of 95 percent
9 correct.

10 And then there's the one study of real eyewitnesses in
11 the real criminal cases making identifications from actual
12 lineups during part of a police investigation where you have
13 to estimate how accurate they are, and the same story
14 emerges, estimated -- estimated high-confidence accuracy is
15 about the same as you get in the lab studies.

16 But I should mention that in this police department
17 field study, pristine conditions were present. We used
18 pristine lineup procedures. So there hasn't actually been a
19 study of real eyewitnesses using nonpristine conditions that
20 are generally prevalent in the real world. There hasn't
21 been such a study. Nobody's ever going to conduct such a
22 study. So we have to rely on the DNA exoneration data to
23 give us some insight about that, how often do high-
24 confidence misidentifications happen when you have less than
25 perfect lineup procedures.

1 And to the extent that those data give us any
2 information, it suggests that even under most nonpristine
3 conditions you are not getting these high-confidence
4 misidentifications.

5 You might see there are cases where we -- also DNA
6 exoneration cases where we have no information about what
7 happened on the first test. Who knows what's happening
8 there. There's -- I would say there is reason to believe
9 they are not happening in that case either, but we don't
10 know for sure.

11 **Q.** Thank you. That's all I have for you, sir.

12 THE COURT: With regard to those matters.

13 MR. OWENS: Very narrow. I think three things.

14 THE COURT: That's fine.

15 MR. OWENS: Thank you, Judge.

16 **RE CROSS-EXAMINATION**

17 BY MR. OWENS:

18 **Q.** I want to just make sure that I understand your testimony
19 here today about the DNA cases and the study you mentioned
20 involving Brandon Garrett, okay?

21 **A.** Okay.

22 **Q.** And was it your testimony that in every single DNA
23 exoneration that Mr. Garrett studied, which was the first 250,
24 that all of the initial confident identifications were made
25 with low confidence?

1 **A.** No. He studied -- he got trial transcripts for 161 of
2 those 270 cases so far. So of that set of 161, there was --
3 the number's either 91 or 92, but I'll say 92 -- there was
4 92 cases where there was -- it came up at trial information
5 about the initial identification. And in those 92 cases --
6 well, in those 92 cases, the witness was confident at trial
7 in their misidentification.

8 But in those 92 cases, which are the only cases we have
9 information about the initial ID, the initial ID was
10 something other than that. Low confidence, filler
11 identification, even a non-identification, things like that
12 happened on the initial test.

13 And when I say not a single case, what I mean is not a
14 single one of those 92 cases did the court testimony
15 indicate that the witness was highly confident on the first
16 test. And that just makes sense that it would be that way
17 because we know later that that person didn't -- shouldn't
18 have matched their memory, right? It's an innocent person,
19 not the guilty perpetrator. It would make sense that they
20 wouldn't be making a high-confidence misidentification on
21 the first test.

22 **Q.** Sir --

23 **A.** And those data would confirm what one would have
24 thought would be true.

25 **Q.** Okay. Please just listen to my question.

1 So in those cases, it's your testimony, consistent with
2 the science, that the testimony given about their confidence
3 at the time itself had probably itself been contaminated,
4 right?

5 A. Yes. But you got to be careful about that because --

6 Q. So the --

7 A. -- the bias is in the other --

8 THE COURT: Doctor, do you need to explain that?

9 THE WITNESS: Yes, because it's going to be
10 misunderstood otherwise.

11 BY MR. OWENS:

12 Q. It's just a yes-or-no question. I think I understand.

13 THE COURT: I know. But if the doctor feels he
14 needs to explain it, I am going to let him explain it.

15 A short explanation, Doctor.

16 THE WITNESS: The short explanation is that the
17 bias, the contamination and bias that you'd expect is that
18 witnesses would misremember their low confidence as being high
19 confidence. There's no principle of memory that suggests that
20 they be at risk of remembering -- now that they are highly
21 confident, that they would misremember their initial ID as
22 being made with low confidence. The bias would be in the
23 opposite direction, which to me --

24 THE COURT: All right. Thank you.

25 THE WITNESS: -- makes it more believable.

WIXTED - RE CROSS (Owens)

1500

1 THE COURT: Next question.

2 MR. OWENS: Thank you, Judge.

3 BY MR. OWENS:

4 Q. I just want to clarify what you're saying is that
5 witnesses, sometimes, for example, they can get feedback after
6 they've made an identification, and that can inflate their
7 confidence -- their stated confidence at a trial proceeding,
8 right?

9 A. Yeah, inflate their remembered confidence on the
10 initial ID even if had been made with low confidence.

11 Q. And that's why it's important for the administrators of
12 the lineups to be careful in recording the stated confidence
13 at the time, because you wouldn't want it to be
14 mischaracterized later, right?

15 A. That's right.

16 MR. OWENS: No further questions.

17 THE COURT: Anything?

18 MR. McLANDRICH: No, sir. Thank you.

19 THE COURT: Anything?

20 MS. FRICK: No, Your Honor.

21 MR. McLANDRICH: Thank you, Doctor.

22 THE COURT: Can this witness be executed?

23 MR. McLANDRICH: He can be excused.

24 THE COURT: Doctor, thank you very much. I think we
25 made your timeline here.

1 THE WITNESS: You did.

2 THE COURT: Thank you very much.

3 THE WITNESS: Thank you.

4 THE COURT: You're excused.

5 Sidebar.

6 (At sidebar off the record.)

7 THE COURT: Counsel for defendant, next witness.

8 MR. McLANDRICH: Your Honor, defendants rest subject
9 to admission of exhibits.

10 **DEFENDANT MOORE RESTS**

11 THE COURT: Township.

12 MS. FRICK: Your Honor, we would rest, also subject
13 to the admission of the exhibits.

14 THE COURT: Ladies and gentlemen, we're going --
15 it's come a point in time where we're going to recess for the
16 day and have you come back at 9 o'clock in the morning. We'll
17 be hopefully prepared to proceed with our next phase of the
18 case, but I do need you to still abide by the admonitions.
19 Ask your family and friends just for a little while longer.
20 Please don't discuss the case amongst yourselves or with
21 anyone else. Please don't formulate any opinions or
22 conclusions. And we'll try our best to be ready for you
23 tomorrow and proceed with the case at that time.

24 Anything further to come before the Court by counsel?

25 MR. OWENS: Not at this time, Your Honor.

1 MR. McLANDRICH: No, sir, Your Honor.

2 MS. FRICK: No, Your Honor.

3 THE COURT: Ladies and gentlemen, we'll stand in
4 recess until 9 o'clock tomorrow morning.

5 THE COURTROOM DEPUTY: All rise. This court stands
6 in recess.

7 (Jury out at 2:07 p.m.)

8 (Recess at 2:07 p.m.)

9 (In open court outside the presence of the jury at 3:41
10 p.m.)

11 THE COURT: We're on the record outside the presence
12 of the jury, and the plaintiff having rested subject to the
13 ruling by the Court on exhibits.

14 You can have a seat.

15 Does the plaintiff wish to move for admission of
16 exhibits?

17 MR. OWENS: We do, Your Honor.

18 THE COURT: Is there any way that -- is there any
19 way that you can -- am I going to go through this entire list
20 of this proposed list or are there a number of agreed
21 exhibits? Have we narrowed objections or anything?

22 MR. McLANDRICH: Your Honor, if I might. Most of
23 them we don't have any issue with. There is a couple of
24 issues. One, we don't believe that transcripts that were used
25 to refresh recollection or that were used to impeach ought to

1 go back and become exhibits for the jury.

2 And the other issue that we have I think we have a
3 resolution for, but it would -- just requires a stipulation on
4 the record that would have to go back to the jury with the
5 exhibits, and that relates to the photo arrays and the fact
6 that the pictures in the arrays are not necessarily in the
7 places where they were when they were presented back in the
8 day. And so with that stipulation, if it gets entered into
9 the record for the jury, then we wouldn't object to the couple
10 of exhibits that they have that represent pictures of the
11 photo arrays.

12 THE COURT: Let me go back to plaintiff.

13 Plaintiff, do you know which of the exhibits that you
14 propose to be admitted are not objected to?

15 MR. OWENS: I don't have clarity on that.

16 THE COURT: So we're going to go through each one,
17 right?

18 MR. McLANDRICH: I think if we answer the question
19 with respect to whether transcripts are going back or not, I
20 can tell you which ones I believe those are, and then, quite
21 frankly, with the stipulation, I don't know that there is any
22 that are objected to.

23 THE COURT: Well, I don't think there are very many,
24 at least if my list is correct --

25 MR. OWENS: Sure.

1 THE COURT: -- I don't think there are a lot of
2 trial -- I assume trial transcripts? I also see a suppression
3 hearing transcript here.

4 MR. McLANDRICH: And grand jury transcript, as well,
5 and Moore's deposition. So I think all those were used for
6 either refreshing or impeaching, and I don't think any of them
7 are exhibits.

8 THE COURT: Well, let's let plaintiff, do you
9 want to go -- I guess without some type of process, I guess
10 I'll need to -- I'll rule on the ones that I can rule on. If
11 I need to take something under advisement, I'll do it.

12 MR. OWENS: Yes, Judge.

13 THE COURT: So why don't you go ahead and move, and
14 then I would ask if counsel can just say objection or not.

15 MR. McLANDRICH: Yes, Your Honor.

16 THE COURT: If I need -- if I need argument from you
17 or basis, I'll ask for that.

18 MR. OWENS: Thank you, Judge.

19 So we would move for admission as it relates to PX Number
20 1, which is the pretrial hearing transcript from the
21 suppression hearing, pages 18, 72, and 53. As a general
22 matter, I think that the transcripts -- we agree with the
23 defense that transcripts that were just shown to a witness
24 just to refresh their recollection, we're not seeking to admit
25 any of those whatsoever, as opposed to the other transcripts

1 that are testimony that happened at the criminal hearing or
2 from Detective Moore in this case. I believe they are
3 substantive evidence and should be given to the jury.

4 THE COURT: Trial transcripts of Detective Moore in
5 this hearing? Or trial?

6 MR. OWENS: The original criminal proceedings.

7 THE COURT: All right. Counsel? Let's just deal
8 with a bunch of this. We got a suppression hearing
9 transcript, we've got PX 1, PX 3, PX 5, PX 9, PX 10. Are
10 those all transcripts?

11 MR. OWENS: Yes, they are, Your Honor, and it's just
12 select pages within those transcripts. I think the total is
13 like 11 pages.

14 THE COURT: Counsel?

15 MR. McLANDRICH: Yes, Your Honor. As I've
16 indicated, I don't believe those should be exhibits to the
17 jury. They were used for either impeachment -- well, we've
18 already agreed that the refreshed won't go back. The
19 impeachment ones, the jury heard the testimony. They don't
20 need the document.

21 Plus, the document is the full page and not even just the
22 portion that was used for impeachment. And so I don't think
23 it's appropriate that the pages go back.

24 MR. HERMAN: The Township would echo those same
25 objections as Mr. McLandrich.

1 THE COURT: Anything else?

2 MR. OWENS: One other small thing for the record,
3 Your Honor, which is that with respect to any testimony of
4 Detective Moore at the prior criminal proceedings, we would
5 argue that it's more than impeachment. Many of them are
6 admissions by a party opponent and should be admitted.

7 THE COURT: PX 1, 3, 5, 9, and 10, if that's what
8 those all are, will not be admitted.

9 Let's go to PX then -- is your next PX 54?

10 MR. OWENS: Yes, Your Honor.

11 THE COURT: I don't know what these are.

12 MR. OWENS: There is a number of pictures from the
13 Montgomery County evidence inspection. I think this is a
14 point in which there should be no objection so long as the
15 parties, I believe, have a stipulation with respect to two of
16 the pictures in this exhibit and in 285 of the photo array,
17 which is the stipulation, is along the lines of that the
18 parties stipulate that the photocopied versions of the array
19 in black and white are what Detective Moore claims the arrays
20 looked like at the time in which they were administered. The
21 photographs that you have now show the colors of the
22 photographs and the -- sort of the boxes in the array, but are
23 not in the position -- the pictures are not in the exact
24 position they were at the time they were shown to the
25 witnesses. Something like that.

1 THE COURT: Now, the photo array, is that within PX
2 54?

3 MR. OWENS: It is, Your Honor.

4 THE COURT: Counsel?

5 MR. McLANDRICH: I'm just looking to see if, in
6 fact, the arrays are in there.

7 MR. OWENS: I misspoke. It's in PX 59.

8 THE COURT: Well, let's just talk about PX 54.

9 MR. McLANDRICH: I don't think I have any objection
10 to PX 54, Your Honor. The pages that are listed, that is.

11 MR. HERMAN: We have no objections, the Township, to
12 PX 54.

13 THE COURT: They'll be admitted.

14 (Plaintiff's Exhibit 54 was received in evidence.)

15 MR. OWENS: We've got PX -- well, I think that we
16 could fast forward. There's -- PX 56 are LEADS sheets; PX 58
17 is the C.W. array. I don't think there are any objections
18 with respect to those.

19 MR. McLANDRICH: Correct.

20 MR. HERMAN: Correct.

21 THE COURT: No objections?

22 MR. McLANDRICH: No objections.

23 MR. HERMAN: None.

24 THE COURT: All right.

25 MR. OWENS: And then PX 59 at page 16, Your Honor,

1 is the photo array which I had just mentioned. I think there
2 is no objection subject to the stipulation being given to the
3 jury previously described.

4 MR. McLANDRICH: Correct.

5 THE COURT: Is there such a stipulation out there?

6 MR. McLANDRICH: Well, we're going to have to put it
7 on the record, but we have conceptually agreed to it, yes.

8 THE COURT: So no objection subject to you guys
9 agreeing on a stipulation?

10 MR. McLANDRICH: Yes, sir.

11 THE COURT: So I'll admit it subject to you guys
12 agreeing on a stipulation. I don't know what my ruling would
13 be but --

14 MR. OWENS: No, I don't think it's something that
15 needs to go into the -- like the rest of the stipulations,
16 like the outset?

17 MR. McLANDRICH: I think this stipulation needs to
18 go to the jury, yes.

19 MR. OWENS: I think it does need to go to the jury,
20 but I think it's something that --

21 THE COURT: I think the issue is, counsel, whether
22 or not the jury instructions -- not the jury instructions --
23 whether or not the stipulation with regard to the lineup photo
24 needs to be part of the jury instructions. Am I right?

25 MR. OWENS: I think so. A perfect question. I

1 think that I have two ideas immediately. The first one is
2 that the --

3 THE COURT: Here's what I'm going to do. I'm going
4 to let you guys work that out.

5 MR. OWENS: Sure, Judge.

6 THE COURT: But we need to know what's going on.

7 MR. OWENS: Thank you.

8 After that, there are Exhibits PX 64; PX 76; PX 80 at
9 pages 19 and 20; PX 104, pages 1, 2, 3, 4, 5, 6, 11, and 12;
10 PX 131; PX 138 at -- I apologize. PX --

11 THE COURT: We're down to 131. Are there any
12 objections to those?

13 MR. McLANDRICH: We object to 80 for the same reason
14 that 80 is the habeas transcript that was used for either
15 refreshing or impeaching. I forget which it was.

16 THE COURT: How about the rest of those?

17 MR. McLANDRICH: 131 is grand jury transcript.
18 Again, it's either refreshing or impeaching. And I think
19 that's as far as we've got.

20 THE COURT: Then we are down to 131. So the
21 objection from defendant is the transcript and the grand jury,
22 more grand jury -- I guess that's a transcript of that.

23 MR. McLANDRICH: And I believe the grand jury was
24 just for refreshing.

25 MR. HERMAN: The Township has those same objections

1 to those two transcript pieces.

2 THE COURT: The Court will admit 64, 76, 104. It
3 will not admit 80 or 131.

4 (Plaintiff's Exhibits 64, 76, and 104 were received in
5 evidence.)

6 THE COURT: All right. We're down to 138, I guess.

7 MR. OWENS: Sure. And just for the record, I think
8 the list the Court has with respect to page -- or PX 131 is
9 missing some pages that we seek to offer. I just want to make
10 sure the record's clear. We're seeking to offer pages 5 and 6
11 and 24 of the grand jury proceedings. I think they are
12 admissions of an opponent, should be given to the jury. I
13 just want to make sure you have that.

14 THE COURT: Counsel, with that modification of his
15 motion to admit, does that change your objection?

16 MR. McLANDRICH: No, sir. We still object.

17 MR. HERMAN: No, Your Honor.

18 THE COURT: It will not be admitted.

19 All right. 138.

20 MR. OWENS: Right. We've got PX 138, PX 153 --
21 excuse me. PX 138 at page 4; PX 153 at page 208; PX 176 at
22 pages 8 and 9; PX 177 at pages 19, 20, 25, and 27; PX 200 at
23 pages 1, 3, 4, 5, 6, and 11; PX 205 at pages 3 and 6; PX 213;
24 PX 215 at pages 1 and 2 --

25 THE COURT: Stop right there.

1 MR. OWENS: Yes, Your Honor.

2 THE COURT: Counsel?

3 MR. McLANDRICH: We don't object to 138.

4 We do object to 153. That was used for either refreshing
5 or impeaching. It's the Moore deposition.

6 We don't object to --

7 THE COURT: You're talking about Detective Moore
8 that testified here in this trial, right?

9 MR. OWENS: His -- sure. I understand the Court's
10 ruling. I just -- I thought -- I didn't realize that was
11 there. I understand the Court's ruling.

12 Again, and I wish counsel would stop saying this is not
13 something that was offered just to refresh. We're not
14 proffering any exhibits for that.

15 THE COURT: I understand. Well, you're offering it.

16 MR. OWENS: We are offering it, but as counsel
17 knows, it's not being offered because it was just merely
18 showed to refresh.

19 THE COURT: Okay. That will not be admitted.

20 What about, what's your position, counsel, on 76 -- 176,
21 177, 200?

22 MR. McLANDRICH: So 176, pages 8 and 9, are fine.

23 177, I think it's 19, 20, 25 and 27, that's fine.

24 200, I have to pull it up because I think I had an issue
25 with one page, or at least I thought it wasn't in. Let me

1 pull it up real quick. I'm sorry.

2 THE COURT: While you are waiting, counsel, how
3 about with regard to those?

4 MR. HERMAN: PX 138, it's only the last page of the
5 S.C. report. So I don't know why we would only have just the
6 last page of the report. It's a four-page report.

7 MR. McLANDRICH: I think, David, we agreed that 11
8 wouldn't come in because it's not dated.

9 MR. OWENS: I don't think we agreed that that's why
10 it wouldn't come in, but we can agree that it won't come in.

11 I apologize, Your Honor. Let me just start again so we
12 have a clean record.

13 As it relates to PX 200, we seek to offer pages 1, 3, 4,
14 5, and 6, not page 11.

15 Then with respect to --

16 THE COURT: Wait a minute. Let me stop right there
17 because counsel was indicating that they had some concerns
18 about PX --

19 MR. HERMAN: 138.

20 THE COURT: -- 138 in that it only included one
21 page. And supposedly the document was an event report.

22 MR. OWENS: That's correct, Your Honor. And that's
23 the -- page 4 is the only page that was shown to the jury.
24 This is the Montgomery County Sheriff's Department report
25 about the arrest of S.C. -- not the arrest -- the incident of

1 S.C. Only page 4 was shown in relation to her description of
2 the perpetrator.

3 THE COURT: Counsel?

4 MR. HERMAN: We have no objection to that.

5 THE COURT: All right. So 138 will be admitted.

6 (Plaintiff's Exhibit 138, page 4, was received in
7 evidence.)

8 THE COURT: 153 will not.

9 176, any objections to that, counsel for the Township?

10 MR. HERMAN: No.

11 MS. FRICK: No.

12 THE COURT: I believe counsel for defendant has
13 already said no objection to that.

14 PX 177, any objections there?

15 MR. McLANDRICH: No objection.

16 MR. HERMAN: No objection.

17 THE COURT: That will be admitted.

18 (Plaintiff Exhibit 177, pages 19, 20, 25, and 27, was
19 received in evidence.)

20 THE COURT: Photos with the modification that Photo
21 Number 11 in PX 20 -- sorry -- PX 200, with the fact that
22 Photo Number 11 will be not offered, Photos 1, 3, 4, 5, and 6
23 will be, is there any objection?

24 MR. McLANDRICH: No, sir.

25 MR. HERMAN: Your Honor, with respect to page 3,

1 that was one where we moved the bottom of the picture. I
2 think it's the Airstream camper.

3 MR. OWENS: I've already redacted it.

4 MR. HERMAN: Just making sure. Thank you.

5 Then no objections from the Township.

6 THE COURT: 176 will be admitted.

7 177 will be admitted.

8 With the clarification, 200 will be admitted with the
9 exception of Photo 11.

10 (Plaintiff Exhibits 176, pages 8 and 9; and 200, pages 1,
11 3, 4, 5, and 6, were received in evidence.)

12 THE COURT: Okay. Let's move on. PX 205.

13 MR. OWENS: Yes, Your Honor. And I'll go a little
14 bit slower to make sure I don't get anything mistaken. So PX
15 205, these are attachments to Detective Moore's affidavit,
16 pages 3 and 6. Page 3 is a cover letter. Page 6 is a camping
17 receipt.

18 PX 213 is a letter that Mr. Gillispie sent to Judge
19 Foley.

20 PX 215 at pages 1 and 2 are documents related to
21 Mr. Gillispie being required to register as a sex offender.

22 THE COURT: Okay. Let's stop right there, and we
23 will go to a different page.

24 Counsel, positions?

25 MR. McLANDRICH: 205, no objection. 213, no

1 objection. 215, I don't think so. Let me just pull it back
2 up. No objection.

3 THE COURT: Counsel?

4 MR. HERMAN: No objection to 205, no objection to
5 213, no objection to 215.

6 THE COURT: Okay. 205, 213, 215 will all be
7 admitted.

8 (Plaintiffs Exhibits 205, pages 3 and 6; 213, and 215,
9 pages 1 and 2, were received in evidence.)

10 MR. OWENS: Your Honor, unless I'm mistaken, which I
11 very may would be, just in an effort to maybe speed things up,
12 I don't think that there are anymore objections to the
13 remaining exhibits that plaintiff seeks to offer. So I could
14 continue to go down the list, but I think --

15 THE COURT: Why don't we do this. Why don't we do
16 this. It won't take -- there are what, eight more exhibits
17 plaintiff plans to offer?

18 MR. OWENS: That's right. And I created this list
19 as an inclusive list because there were some exhibits that the
20 plaintiff used that were defendant's markings. So I don't
21 know if it matters who offers it, but I can continue to go
22 down the list.

23 THE COURT: Okay. Let's deal with plaintiff's
24 exhibits.

25 MR. OWENS: Sure. Yes, Judge.

1 THE COURT: Plaintiff's exhibits, just run through
2 the numbers first for me.

3 MR. OWENS: Yes, Judge. The next would be 247, the
4 composite with the glasses.

5 249 at page 1. It's a Miami Valley report.

6 PX 252 at page 1 is another Miami Valley report.

7 PX 254 at pages 1, 8, and 9. This is the forensic report
8 of Susan Perry Dyer which was used during the testimony of
9 Dr. Benjamin Miller.

10 PX 281 at pages 1 and 2 is a report from Detective
11 Bailey.

12 PX 282 is another report from Detective Bailey.

13 PX 284 at pages 2, 5, 6, and 8 are photos of
14 Mr. Gillispie and his art that were shown during his
15 examination.

16 PX 285 are pictures from the more recent inspection of
17 the evidence and include photo array and other pictures.
18 That's pages 6, 7, 9, and 10 I think would be admitted subject
19 to the stipulation we previously discussed.

20 Those are plaintiff's. Those are the exhibits that
21 plaintiff intends to offer that have plaintiff's designation.

22 THE COURT: So you are moving to offer those, right?

23 MR. OWENS: Yes, Your Honor.

24 THE COURT: Counsel?

25 MR. McLANDRICH: I don't have an objection with the

1 exception of 254, which I think is a hearsay record. It's not
2 authenticated and shouldn't be admitted.

3 THE COURT: But no objections as to 247, 249, 252,
4 281, 282, 284, and 285?

5 MR. McLANDRICH: I believe so. I'm sorry. What
6 were the 285 pages again? Because I think there are some more
7 that I didn't have on my sheet here.

8 THE COURT: Those are Photos 6, 7, 9, and 10.

9 MR. McLANDRICH: Subject to the stipulation, I have
10 no objection, Your Honor.

11 THE COURT: Counsel?

12 MR. HERMAN: The only objection we had was to 254,
13 which Mr. McLandrich raised. Otherwise, no objections to the
14 other ones.

15 THE COURT: They'll all be admitted except for PX
16 254.

17 (Plaintiff's Exhibits 247; 249, page 1; 252, page 1; 281,
18 pages 1 and 2; 282; 284, pages 2, 5, 6, and 8; and 285, pages
19 6, 7, 9, and 10, were received in evidence.)

20 THE COURT: Now, counsel for --

21 MR. OWENS: Can --

22 THE COURT: Go ahead.

23 MR. OWENS: With respect to 254, there was no
24 objection made to the foundation of this document being shown
25 to the jury. It was shown to the jury. And if there was --

1 THE COURT: The foundation of it, what do you mean?

2 MR. OWENS: I thought that the objection here was
3 that there wasn't adequate foundation to present it to the
4 jury. If I missed that --

5 THE COURT: That's not what I heard.

6 What is --

7 MR. McLANDRICH: My objection is that, A, it's a
8 hearsay document and, B, it wasn't authenticated. And the
9 fact that the doctor reviewed it as a part of his report
10 doesn't make it an exhibit in the trial anymore than his
11 exhibit is -- his report is an exhibit.

12 MR. OWENS: So, I mean, this is a little bit of a
13 surprise, but the first thought I have is that it's probably a
14 self-authenticating document. It's a document that's created
15 by state agency, the Ohio Department of Corrections. It's
16 their document, actually. But I don't --

17 THE COURT: All right. Here's what we'll do. I'm
18 admitting all of them from 247, 249, 252, 281, 282, 284, 285.
19 Those will all be admitted. I'll reserve ruling. I'm not
20 quite sure I understand the argument, but I'll consider it.

21 Now, how do you want to deal with these? My
22 understanding is that plaintiff wishes to also move -- and I
23 don't know whether they are the same exhibits that you want to
24 move, Defendant. I don't know.

25 MR. McLANDRICH: I'm sorry. So we have exhibits

1 that we intend to move in. Some of them, you know, may be
2 duplicative, but sort of going based on what the Court was
3 indicating previously --

4 THE COURT: Right.

5 MR. McLANDRICH: -- that the jury may have notes
6 that, you know, they've --

7 THE COURT: Then let's do this. Let's do this.
8 Counsel, if there are no objections, what I'm going to do is I
9 am going to have defendant then move for -- well, wait a
10 minute.

11 I guess at this point in time I should hear any motions
12 with regard to the defendant. Defendant's motion.

13 MR. McLANDRICH: Yes, sir, Your Honor. We would
14 move for a directed verdict on the allegation that Detective
15 Moore suppressed or destroyed reports. The evidence is too
16 equivocal to allow a reasonable jury to find by a
17 preponderance of the evidence that Detective Moore suppressed
18 or destroyed reports.

19 There was testimony from Mr. Fritz that Mr. Bailey, he
20 believes, created a report and that he approved it, but he
21 likewise testified that reports are often misfiled. Did not
22 testify and, as a matter of fact, testified specifically that
23 he could not say that Detective Moore was ever in possession
24 of such a report.

25 And we don't believe that there is sufficient evidence

1 upon which a reasonable jury could find by a preponderance of
2 the evidence that Detective Moore was ever in possession of
3 the report and, more importantly, no evidence that he ever
4 suppressed or destroyed the report.

5 We believe that any effort to rely on an inference that
6 someone testified to the mere existence of the report would
7 justify a finding that he suppressed it or destroyed it is
8 negated by the alternative explanation, which is at least
9 equally likely, that the report was never -- was misfiled and
10 never came into his possession.

11 So based on that, Your Honor, we would move that a
12 directed verdict be entered for Detective Moore with respect
13 to the allegation of the suppressed or destroyed report.

14 Likewise, with respect to any other sort of alleged
15 suppressed or destroyed evidence, specifically, let's say, the
16 campground receipts, there is no evidence that any other
17 campground receipts ever existed or ever came into the
18 possession of Detective Moore, which he again could have
19 suppressed or destroyed. There is no evidence that he had and
20 suppressed or destroyed such documents. Certainly not enough
21 to allow a jury to make -- a reasonable jury to make a finding
22 by a preponderance of the evidence on that issue.

23 THE COURT: Counsel for plaintiff.

24 MR. OWENS: Yeah. Your Honor, I understand that
25 counsel has a duty to zealously defend their client. This

1 motion, to me, I have trouble understanding any kind of
2 factual basis for this motion that --

3 THE COURT: You heard his argument. Just respond to
4 his argument.

5 MR. OWENS: Sure. First, as it relates to generally
6 the suppression of evidence claim in this case, I don't think
7 it would be appropriate to pars specific legal theories and
8 sort of was it this or was it that. There's a number of
9 different bases for -- of evidence that is in the record that
10 would illustrate that -- that would substantiate a claim that
11 evidence was suppressed.

12 So even assuming, even though it would be improper to do
13 so, that you could sort of excise one particular theory from a
14 larger due process claim as it relates to the reports, the
15 motion here is sort of a regurgitation of the things that were
16 argued at summary judgment. You don't have specific knowledge
17 that -- of exactly what was in the file when Detective Moore
18 received it. But *Elkins* itself, you know, illustrates that
19 the jury is allowed to infer from circumstantial evidence.
20 And I think there was something in the Court's summary
21 judgment order about this, that, you know, this is the normal
22 course of business, that you have a detective who testified
23 that the reports, one, that they exist, two, that they were
24 put in the file.

25 Detective Moore has sworn under oath he read supplemental

1 reports from -- that were authored by -- specifically authored
2 by Fritz. Those have not been produced. That is beyond
3 sufficient for a reasonable jury to find, construing the
4 evidence in the favor and light most favorable to the
5 plaintiff as the Court must at this juncture, that the reports
6 existed. They were in the report, and the Detective Moore did
7 not turn them over.

8 In addition to that, the counsel's suggestion that there
9 is an alternative explanation for where the reports went, that
10 reports were frequently misfiled, something like that, I think
11 that's a very telling admission. There is an alternative
12 explanation. Is it proven as a matter of law that the files
13 were mis -- that this was misfiled? No, it is not. This is a
14 quintessence jury question that the jury must decide, and it's
15 not something that this Court can do at this juncture, is to
16 weigh the evidence as relates to that.

17 And I will apologize, Your Honor. I did not mean to sort
18 of seem so harsh with respect to my front on the other side.
19 However, as it relates to this issue of the campground
20 receipts, it was -- the evidence in the case is beyond
21 sufficient to find that Mr. Moore had the camping receipts,
22 had more than the three that he claims that he had. So
23 Detective Moore's testimony is I only had three camping
24 receipts: one from May, one from June, one from July. I had
25 none from August.

1 However, he testified at the grand jury that he had the
2 camping receipts for the few months before, which is
3 sufficient to find that he had more than these three specific
4 receipts. But even if the Court were not inclined to find
5 that that admission is not required denying the motion, the
6 next sentence in the grand jury is. He says Gillispie was
7 down there for the four days after. Of course -- after the
8 rapes, which, of course, took place in August.

9 Detective Moore has never produced any campground
10 receipts for the month of August, which he claims under oath
11 that he had in front of the grand jury. And so I don't -- I
12 have trouble with the idea that the evidence construed in the
13 light most favorable to the plaintiff would not substantiate
14 that claim.

15 THE COURT: All right. Are you done? I'm sorry.

16 MR. OWENS: I am, Your Honor.

17 THE COURT: I didn't mean to cut you off.

18 MR. OWENS: No, no. I appreciate it.

19 I guess the last thing that I would say is that, as a
20 general matter, the evidence that has been presented on the
21 suppression claims far exceeds that which was before this
22 court at summary judgment. A Rule 50 motion is analogous to
23 that. And so I think that it's time to submit this case to
24 the jury.

25 THE COURT: All right. Last word, Counsel.

1 MR. McLANDRICH: I will stand on what I've said.

2 Thank you.

3 THE COURT: Thank you for your arguments, counsel.
4 The Court's considered your arguments, considered what I've
5 listened to over the last week. Viewing the evidence in light
6 most favorable to the plaintiff, the Court does not find that
7 there is -- there is no genuine issue of material fact for a
8 jury and reasonable minds could come to but one conclusion.
9 And so, therefore, the motion is denied.

10 Now, let's move on to defendant's exhibits.

11 I've quickly reviewed the, I think plaintiff's counsel
12 said composite or something, but it looks as though they are
13 pretty much all the same. But, Counsel, I am going to let you
14 go forward, and if you want to run through the exhibits that
15 the defendant wishes to move into evidence.

16 MR. OWENS: Can I ask a question? What document are
17 you going to be using to read from, if you are? The one that
18 you sent or the one that we sent?

19 MR. SIPUSIC: The one that had been sent.

20 MR. OWENS: And that one includes all the stuff on
21 ours and more; is that right?

22 THE COURT: There's a few more things.

23 MR. McLANDRICH: I think there were a couple more.

24 THE COURT: Did you get it?

25 MR. OWENS: I got it as the Court was walking out.

1 THE COURT: Well, there is not a whole lot more.
2 I'm sure, Mr. Owens, you will be able to respond to it.

3 MR. McLANDRICH: Yes, sir, Your Honor. We would
4 move for the admission of Defendant's Exhibit 1, pages 1 to 4.

5 THE COURT: Let's run through about ten of those.

6 MR. McLANDRICH: Sure. Defendant's Exhibit 2, 1 to
7 14.

8 Defendant's Exhibit 3, 1 to 13.

9 Defendant's Exhibit 4.

10 Defendant's Exhibit 5.

11 Defendant's Exhibit 6, pages 1 and 2.

12 Defendant's 7, pages 1 and 2.

13 Defendant's 8, 1 through 10.

14 Defendant's 9, 1 through 4.

15 Defendant's 10, pages 1 and 2.

16 THE COURT: Let's hang right there.

17 Any objections?

18 MR. OWENS: I need a minute, Your Honor.

19 THE COURT: All right.

20 MR. OWENS: I apologize. We made it all the way to
21 10?

22 THE COURT: Right.

23 MR. OWENS: No objections with those exhibits, Your
24 Honor.

25 THE COURT: Okay. So Defendant's Exhibits 1, 2, 3,

1 4, 5, 6, 7, 8, 9, and 10 will be admitted.

2 (Defendant's Exhibits 1, pages 1 to 4; 2, pages 1 to 14;
3 3, pages 1 to 13; 4; 5; 6, pages 1 and 2; 7, pages 1 and 2; 8,
4 pages 1 through 10; 9, pages 1 through 4; and 10, pages 1 and
5 2, were received in evidence.)

6 THE COURT: All right, Counsel.

7 MR. McLANDRICH: Defendant's Exhibit 11, page 1.

8 Defendant's Exhibit 12, page 1.

9 Defendant's Exhibit 13, pages 1 and 2.

10 THE COURT: Hang on just a second.

11 MR. McLANDRICH: Surely.

12 THE COURT: Do you have a position on any of those
13 exhibits, counsel?

14 MS. FRICK: We have no objection.

15 THE COURT: Go ahead. I'm sorry.

16 MR. McLANDRICH: Quite all right. Defendant's
17 Exhibit 13, pages 1 and 2.

18 Defendant's 14, page 1.

19 Defendant's Exhibit 15, pages 1 and 2.

20 Defendant's Exhibit 17, page 1.

21 Defendant's Exhibit 18, pages 1 through 3.

22 Defendant's Exhibit 19, pages 1 through 3.

23 Defendant's Exhibit 22, pages 1 through 3.

24 Defendant's Exhibit 28, pages 1 through 18.

25 Defendant's Exhibit 31, pages 1 and 2.

1 THE COURT: Let's stop right there.

2 MR. OWENS: I need a moment to check DX 28, but no
3 objection with respect to all of those. If I can have one
4 minute on 28.

5 THE COURT: Surely.

6 MR. McLANDRICH: Just to perhaps assist, 28 is
7 redacted to eliminate the Torrie Strohman references that we
8 agreed to.

9 MR. OWENS: That's what I was trying to check.

10 THE COURT: That made you happy, Mr. Owens?

11 MR. OWENS: It was just a thing to double check so I
12 didn't get myself in trouble. So no objection.

13 THE COURT: No objection?

14 MR. HERMAN: No objections, Your Honor.

15 THE COURT: All right. Defendant's Exhibits 11, 12,
16 13, 14, 15, 17, 18, 19, 22, 28, and 31 will be admitted --
17 well, as described will be admitted.

18 (Defendant's Exhibits 11, page 1; 12, page 1; 13, pages 1
19 and 2; pages 1 and 2; 14, page 1; 15, pages 1 and 2; 17, page
20 1; 18, pages 1 through 3; 19, pages 1 through 3; 22, pages 1
21 through 3; 28, pages 1 through 18; and 31, pages 1 and 2, were
22 received in evidence.)

23 MR. McLANDRICH: And I should note, Your Honor, that
24 Defendant's Exhibits 18, 19, and 22 are also the subject
25 matter in the stipulation we have talked about earlier with

1 respect to the photo arrays.

2 MR. OWENS: So you will provide us with a redacted
3 version of 28. I mean, our 104 is redacted.

4 MR. McLANDRICH: We will send it to you if we
5 haven't already.

6 MR. OWENS: The one I have, I mean. There's a lot
7 of versions of it in the cloud.

8 MR. McLANDRICH: Got you.

9 THE COURT: Let's move on to the second page. I
10 guess we're up to Defendant's 32.

11 MR. McLANDRICH: Yes, Your Honor. Defendant's
12 Exhibit 32, pages 1 and 2.

13 Defendant's 33, pages 1 and 2.

14 Defendant's -- I'm sorry. 45 and 46 we withdraw.

15 And then we would withdraw PX 3, PX 5 that are also on
16 our list.

17 PX 54, we used page 72. I think that's redundant.
18 Plaintiff already has that in, I believe, but if not, PX 54,
19 pages 72.

20 PX 56.

21 THE COURT: Did I already --

22 MR. OWENS: You did already.

23 THE COURT: I already admitted that.

24 MR. McLANDRICH: PX 80 we would withdraw.

25 PX 249.

1 PX 252.

2 MR. OWENS: 252's already in.

3 MR. McLANDRICH: So the rest of these are already
4 admitted by plaintiff. So I think we're good, Your Honor. We
5 would move those to be admitted.

6 THE COURT: So the exhibits that have not already --
7 you don't -- Counsel, you don't have any real concern about
8 the fact that they were admitted in as plaintiff's exhibits?

9 MR. McLANDRICH: No, sir, Your Honor.

10 THE COURT: So the exhibits that have been moved
11 into -- are there certain pages on -- well, that's Plaintiff's
12 exhibit.

13 Are you moving for the same pages, the photos that were
14 included in the -- I guess what I'm asking you, is your motion
15 for plaintiff's exhibits any different than plaintiff's
16 motions were? I guess, like, for example, PX 285, plaintiff
17 moved for admission of 6, 7, 9, and 10.

18 MR. McLANDRICH: I think we -- no. I think they
19 have 9. I think we're fine.

20 THE COURT: I just want to make sure that we've got
21 the same exhibit and we're not -- one person's not asking for
22 an exhibit with different pages than the others.

23 252 is page 1. Is that what you've moved, Counsel?

24 MR. McLANDRICH: Yes.

25 THE COURT: And what else was there?

1 MR. McLANDRICH: 249, page 1.

2 THE COURT: 249, page 1?

3 MR. McLANDRICH: I think that's, frankly, a
4 redundant exhibit. I think we only used page 1 of that.

5 THE COURT: Well, that's what was admitted for the
6 plaintiff.

7 Okay. So the Court -- anything?

8 MR. HERMAN: No objections.

9 THE COURT: Defense Exhibit 32, pages 1 and 2;
10 Defendant's Exhibit 33, pages 1 and 2, will be admitted.

11 (Defendant's Exhibits 32, pages 1 and 2; and 33, pages 1
12 and 2, were received in evidence.)

13 THE COURT: It is my understanding that Defendant's
14 45 and 46 are being withdrawn, and the defendant's motion with
15 regard to Plaintiff's 3 and 5 and 54, as well as 80, have been
16 withdrawn.

17 What was your position on the LEADS sheet? I think
18 that's already been admitted under plaintiff, right?

19 MR. OWENS: It hadn't. We have no objection.

20 THE COURT: Is that what you want?

21 MR. McLANDRICH: Yes, sir.

22 THE COURT: And then PX 249, page 1; 252, page 1;
23 and PX 285, pages 6, 7, 8, and 10 will be admitted.

24 You didn't object to any of those, did you?

25 MR. HERMAN: No, we didn't.

1 THE COURT: If I've not, I've admitted Plaintiff's
2 56.

3 (Plaintiff's Exhibit 56 was received in evidence.)

4 MR. OWENS: Sweet.

5 THE COURT: Are there any other exhibits?

6 MR. McLANDRICH: No, sir. I think that's it.

7 MR. HERMAN: No.

8 THE COURT: Okay. Plaintiff having rested, the
9 Court dealing with plaintiff's proposed -- or exhibits;
10 defendant now having rested, defendant's exhibits have been
11 dealt with.

12 Any -- there's a motion. Anything from the Township?

13 MS. FRICK: Your Honor, we'd like to make a motion
14 as well.

15 THE COURT: You'd like to make a motion?

16 MS. FRICK: Yes, Your Honor.

17 THE COURT: All right. Well, we've got a motion
18 that's been filed too. Let's go to that -- let's go that way.

19 Plaintiff.

20 MR. OWENS: Yes, Your Honor. So with respect to the
21 issue of Detective Moore acting within the scope of his
22 duties, no reasonable jury could find that his actions were
23 outside the scope of his duties. The evidence construed in
24 the light most favorable to the Township shows, at best, that
25 Detective Moore might have not had the best mental state.

1 However, the functions that he has performed in this case --
2 creating lineups, turning evidence over to the prosecutor,
3 arresting Mr. Gillispie -- are quintessential police
4 functions. The idea here is essentially that this is what the
5 police do. That's what he was employed to do.

6 It's undisputed in this case that he is acting under
7 color of law. That issue is not even being submitted to the
8 jury. So I don't think any reasonable jury could find that
9 the Detective Moore was doing anything but acting in the scope
10 of his duties as a police officer.

11 And I want to address this because I think it's
12 important, and the reason we are filing the motion is to try
13 to clear some up -- some stuff up for the jury and to narrow
14 what's in front of them as it relates to these issues about
15 manifestly and all this other stuff.

16 The Township's response to our motion conflates the
17 separate inquiries that exist with respect to scope of
18 employment and with respect to the mental state of not good
19 faith.

20 The issue here has to do solely with was he acting like a
21 police officer when he did this. The answer's obviously yes.
22 The case law shows pretty clearly that people who make
23 mistakes, even when they are on duty, are still acting within
24 the scope of their employment. I know that Detective Moore
25 doesn't think that he's made a mistake, but the evidence,

1 construed in the light most favorable to the Township, could
2 permit an inference that he was acting in not good faith.
3 However, he was acting in not good faith as a police officer.

4 He hasn't done anything that's sort of extreme type
5 conduct that you would see that would fall outside the scope
6 of employment. The quintessential example here is sexually
7 assaulting somebody, and that type of thing is sort of
8 analogous to absolute immunity that, you know, prosecutors and
9 judges have, like under *United States against Lanier*. There
10 is absolute immunity, but, whoa, that is something that does
11 not have to do with your job whatsoever. Making a mistake
12 with respect to a photo lineup or suppressing evidence or
13 doing quintessential police functions falls in that category.

14 So for those reasons, we think that this issue should be
15 resolved on this type of a motion and not submitted to the
16 jury because no reasonable jury could conclude that Moore
17 acted outside of the scope of his employment without sort of
18 collapsing the entire inquiry into itself to which is, if
19 anybody makes a mistake in the course of their duties, then
20 they are acting outside of their scope of their employment,
21 which is simply not the law, simply not the basic agency
22 principles that would apply to such a circumstance.

23 THE COURT: All right. Counsel?

24 MS. FRICK: Yes, Your Honor. In response to that,
25 first of all, we would say that there is sufficient duty or

1 sufficient evidence that a reasonable jury could find not only
2 that he was outside the scope of his employment, but they
3 ignored the second part of that test that says "or official
4 duties."

5 There was significant testimony about what the official
6 duties of a police officer are, and there was also testimony
7 that we lay out in the motion with respect to not only
8 Mr. Moore, Mr. Fritz, Dr. Scott, Mr. Wilson, and even
9 Mr. Monheim today that if, in fact, actions that have been
10 alleged by plaintiff's counsel did occur, that they would be
11 outside of those official duties.

12 Additionally, with respect to the issue of scope of
13 employment, it still has to be acting within the employer's
14 interest. Mr. Monheim today said that the -- with respect to,
15 for example, the photo arrays, it's in the employer's interest
16 to provide a -- not an unduly or unnecessarily suggestive
17 photo array. And in this case, the allegation is that that
18 was knowingly done. There's been evidence about that by
19 plaintiffs claiming that that was knowingly done, that
20 Mr. Moore would have known and should have known what the
21 techniques were that were appropriate for a photo array at
22 that time, and that he didn't do it.

23 But, again, without addressing the official
24 responsibility, or official responsibility portion of the
25 statute, plaintiffs are essentially -- or plaintiffs and

1 defendant, if they have joined the motion, are ignoring a
2 portion of the statute that we don't believe the Court can do
3 because it's in there for a reason, and the legislature put it
4 in there for a reason, and there's significant testimony about
5 those official responsibilities of an officer.

6 MR. OWENS: Yes. The official responsibilities of a
7 police officer is doing things like creating photo lineups,
8 turning stuff over to the prosecutor. I don't think that
9 there is a separate inquiry implied under the law. There is
10 certainly not in a case as cited by the Township that would
11 indicate that. But even if you assume that hypothetical,
12 these are just the quintessential basic official
13 responsibilities of a police officer. It's not like he is not
14 being a police officer even if the photo lineup was
15 suggestive. If a police officer arrests somebody and a jury
16 finds that they committed excessive force, it's not like, oh,
17 you are no longer a cop because a jury found, you know, you
18 engaged in excessive force. You were being a police officer
19 doing your quintessential function, and that's why the motion
20 should be granted.

21 THE COURT: All right.

22 MR. McLANDRICH: Your Honor, if I might be heard on
23 this?

24 THE COURT: Sure.

25 MR. McLANDRICH: So a couple of observations. First

1 off, while we certainly agree that Mr. Moore was acting in the
2 course and scope of his employment, as I think plaintiff
3 noted, we certainly don't agree with the conduct allegations
4 against him. But we certainly do agree that at all times he
5 was acting within the course and scope of his employment.

6 Since plaintiff isn't a party to that claim, I'm not sure
7 they can move for a directed verdict on it. It seems to be
8 sort of a obvious issue. But that said, certainly Defendant
9 Moore would move for a directed verdict on the intervenor
10 complaint. I think certainly there is no evidence that he
11 acted in bad faith or outside the course and scope of his
12 employment. But, you know, recognizing what the Court has
13 already said with respect to our motion for a directed verdict
14 on the suppression and destruction claim, it seems to me that
15 those issues may be interrelated.

16 THE COURT: Thank you. Let me get all this under my
17 belt here.

18 Do you have a motion back there?

19 MS. FRICK: Well, Your Honor, I think -- I mean,
20 this addresses just the issue of scope of employment and
21 official responsibilities. We would maintain that in
22 addition, that there should be a directed verdict as to the
23 issue of bad faith or outside of the scope. Outside of the
24 scope and official responsibilities is already addressed, but
25 in terms of bad faith, I think that, you know, the definition

1 of bad faith is just, in fact, that it would be conscious
2 wrongdoing.

3 And there's been a sufficient amount of evidence that
4 plaintiff has presented that Mr. Moore would have, you know --
5 he knew that he had these receipts, and he didn't turn them
6 over. He knew that he had reports because of this testimony
7 that he apparently gave -- or excuse me -- that he put in the
8 affidavit, and he didn't turn them over.

9 This was the evidence that the plaintiff himself put on.
10 And because of that, we would take the position that there
11 should be, as well, a judgment as a matter of law as to the
12 issue of bad faith.

13 THE COURT: Did I let you respond to --

14 MR. McLANDRICH: I would respond to her motion just
15 noting that the evidence is, at best, equivocal with respect
16 to Defendant Moore's conduct in terms of any alleged bad
17 faith, suppression, destruction of reports that could be the
18 possible foundation of any finding that he acted outside the
19 course and scope or in bad faith.

20 And as has been noted with respect to the other motions,
21 you know, the evidence must be construed most strongly against
22 the Township as the movant on this issue. And until there is
23 a jury finding with respect to whether he even engaged in any
24 inappropriate conduct, I think it's impossible to suggest that
25 a directed verdict finding that he acted not in good faith and

1 outside the course and scope of his employment is possible.

2 MR. OWENS: This is fun. I guess I just think
3 plaintiff's position is while there is, with respect to the
4 officer's mental state is a quintessential jury instruction --
5 or jury question. You know, you'll find that in basic law.
6 So that's fine.

7 And -- but two brief things. One, I do think that given
8 this is a trial in which the jury in this case has heard from
9 the Township, they have been, you know, participating in the
10 case and they note -- they were allowed to give opening
11 statements, the jury instructions will be viewed as a whole,
12 we absolutely have standing with respect to the issues that
13 will be presented to the jury. If plaintiff prevails in this
14 matter, you know, it could be a judgment creditor. One of
15 them might be the Township. So I think we absolutely have
16 standing with respect to preserving our right to seek a
17 potential judgment as a judgment creditor, notwithstanding
18 whatever the Ohio Supreme Court has to say as a matter of
19 state law with respect to the statute.

20 Last, I don't think I have heard anybody say that there's
21 any evidence that Detective Moore, when he prepared photo
22 arrays or gave evidence or didn't give evidence to the
23 prosecutor, was not performing a quintessential function that
24 a police officer does every day. And so our motion should be
25 granted.

1 As stuff related to mental state, that's something that
2 should go before the jury. Thank you.

3 THE COURT: You responded at this point.

4 Any final words back there?

5 MS. FRICK: No, Your Honor. I mean, I would tend to
6 agree with defendants that I'm not sure that they do have the
7 standing, any more than we were able to argue on the issues
8 between those two parties on liability itself. I'm not
9 sure -- I mean, we clearly had an interest in that, as well,
10 if, as plaintiff says, they may be a judgment creditor. But I
11 think that the intervenor complaint is between the Township
12 and Mr. Moore.

13 THE COURT: Final word on your motion?

14 MR. McLANDRICH: No, sir. Thank you.

15 THE COURT: Folks, give me about three or four
16 minutes, and I'll be back in and rule on the motions.

17 The other thing, what we need to do is I think you've
18 been delivered copies of the proposed jury instructions. Now,
19 I am not prejudging these motions, but I have given you copies
20 of the jury instructions, and I would entertain when I come
21 back in -- well, do you need some time to look at them?

22 MR. OWENS: No.

23 THE COURT: Counsel?

24 MR. McLANDRICH: We'll look at it in the time that
25 you're absent.

1 THE COURT: All right. I'll give you an opportunity
2 to place on the record any objections to the jury
3 instructions. Thank you.

4 THE COURTROOM DEPUTY: All rise. This court stands
5 in recess.

6 (Recess at 442 p.m.)

7 (In open court outside the presence of the jury at 4:54
8 p.m.)

9 THE COURT: Everyone, the Court has considered the
10 motions now before the Court.

11 With regard to Plaintiff Gillispie's motion for a
12 judgment as a matter of law on the scope of employment, under
13 Ohio Revised Code Section 2744.07, Document Number 467, the
14 intervenor filed a response in opposition, Document Number
15 468. The Court finds that the motion is denied.

16 The intervenor filed a single-count intervenor complaint
17 against Matthew Scott Moore. In that complaint, the
18 intervenor seeks a declaratory judgment that it does not owe a
19 duty to Defendant Moore in connection with the amended
20 complaint in the underlying action; and, two, it does not owe
21 a duty to indemnify Moore in connection with the claims
22 asserted against him in the amended complaint filed in the
23 underlying action.

24 In the motion, plaintiff argues that no reasonable jury
25 could find that Moore took an act outside the scope of his

1 employment. First, the Court finds that the motion is denied
2 because it does not appear that plaintiff has standing to file
3 the motion because plaintiff is not a party to the
4 intervenor's complaint.

5 Second, even if no reasonable jury could find that Moore
6 took an act outside the scope of his employment, that does not
7 mean that the intervenor's claim must fail. In other words,
8 even agreeing with Gillispie would not lead to a judgment
9 against the intervenor on its claim.

10 Rule 50(a) provides that the Court may grant a motion for
11 judgment as a matter of law against a party on a claim or
12 defense that, under the controlling law, can be maintained or
13 defeated only with a favorable ruling on that issue.

14 Here -- but here, Ohio Revised Code, Section 2744.07 at
15 subparts (A)(2) and (B)(2) provide for alternative ways that a
16 political subdivision would not have a duty to defend or a
17 duty to indemnify. Moreover, the Court is not being asked to
18 decide the intervenor's complaint.

19 Third, the Court finds that the motion does fail on its
20 merits, as well. Viewing the evidence in light most favorable
21 to the Township, the Court does not find there is no genuine
22 issue of material fact for the jury and reasonable minds could
23 come to but one conclusion in favor of the moving parties.

24 For all those reasons as I've indicated, the motion is
25 denied.

1 With regard to the Township's motion, the Court finds
2 viewing the evidence in light most favorable to the
3 defendant -- or the plaintiff, the Court does not find that
4 there is no genuine issue of material fact for the jury and
5 reasonable minds could come to but one conclusion in favor of
6 the moving party. So, therefore, that motion is denied.

7 With regard to the defendant's motion against the
8 Township, the Court finds that the viewing the light most --
9 viewing the evidence in light most favorable to the Township,
10 the Court does not find that there is no genuine issue of
11 material fact for the jury and reasonable minds could come to
12 but one conclusion in favor of the moving party. So,
13 therefore, all motions are denied.

14 One correction. Just correcting my recitation on the
15 ruling by -- on the Gillispie motion. I guess I mentioned
16 Rule 58. It was 50(a).

17 MR. OWENS: I heard that. How could 58 apply?

18 THE COURT: Well, that's right.

19 The other thing was that I believe the Court also said
20 that, moreover, the Court here is not being asked. I think
21 it's the jury that's not being asked.

22 Other than that, everything stays the same.

23 MR. McLANDRICH: Your Honor?

24 THE COURT: Yes.

25 MR. McLANDRICH: We noticed with respect to exhibits

1 that there was one we inadvertently failed to list that we
2 would like to have admitted.

3 THE COURT: All right.

4 MR. McLANDRICH: And that was Defendant's 23.

5 THE COURT: Any objection?

6 MR. OWENS: No, Your Honor.

7 MS. FRICK: I have to pull it up. Nobody said
8 anything to us about it.

9 MR. HERMAN: Is that the work schedule?

10 MR. McLANDRICH: It's the letter about the work
11 schedule.

12 MR. HERMAN: We have no objection.

13 THE COURT: It will be admitted without objection.

14 (Defendant's Exhibit 23 was received in evidence.)

15 MR. McLANDRICH: Thank you, Your Honor.

16 THE COURT: Counsel, you've been distributed copies
17 of the jury instructions that the Court has drafted and
18 finalized after your comments, concerns, and, I believe,
19 objections; but to formally place any further comments,
20 concerns, or objections upon the record, the Court will afford
21 an opportunity for all counsel to at this point in time
22 register any objections that they wish with regard to the jury
23 instructions.

24 So counsel for plaintiff.

25 MR. OWENS: Would you like to go sort of instruction

1 by instruction or take them all together?

2 THE COURT: Well -- do we have, I guess it makes a
3 difference with regard to the number of instructions. We can
4 go instruction by instruction, but then I would -- I'll tell
5 you what I'll do. I'll ask each of the parties if there is
6 any objection with regard to the instructions.

7 Go ahead.

8 MR. OWENS: I think that the first potential
9 objection -- and I don't mean to speak for all parties -- it
10 probably starts at page number 21. So I don't know if the
11 Court would need to go through the first preliminarily --

12 THE COURT: Let me ask this: Counsel for the
13 defendant, are there any objections prior to 21?

14 MR. McLANDRICH: No, I don't believe so, Your Honor.
15 The one observation I would offer, though, is --

16 MR. OWENS: Oh, sorry. I'm -- just totally blanked.

17 Plaintiff's going to voluntarily drop the destruction of
18 evidence claim, the third claim. We discussed this with
19 Mr. McLandrich during our break.

20 So we also discussed sort of doing the same thing that we
21 did earlier in the week in terms of stipulation, and so there
22 will be -- and we do apologize to the Court for not bringing
23 this to your attention earlier. There's, frankly, a
24 miscommunication on our side about that. And so that would --
25 that will require some revision.

1 Is that what you are referring to?

2 MR. McLANDRICH: Yeah.

3 THE COURT: All right. You need to follow the same
4 procedures that you did before, and we'll try to --

5 MR. OWENS: Yes, Your Honor.

6 THE COURT: When do you think that's going to be
7 done?

8 MR. OWENS: Give me half an hour after we get out of
9 here.

10 Now, with -- I guess the question's -- none of that
11 impacts anything --

12 THE COURT: All right.

13 MR. OWENS: -- before page 21, I'll say that. With
14 respect to page 21, given that the Court has denied our and
15 Defendant Moore's motion with respect to the Township -- and
16 the Township is part of the case -- the first two sentences of
17 page -- of the burden of proof we believe are objected to and
18 inappropriate given that there are claims in this case by
19 which other parties have the burden of proof. And it's
20 redundant of the other claims which do set forth the burden as
21 it relates to those particular claims.

22 THE COURT: All right. Anything from the defense?

23 MR. McLANDRICH: I would just respond to that by
24 noting that with respect to the Township's claim, the jury
25 will not be making a finding of whether a burden of proof is

1 sustained. The dec action is a question of law for the Court
2 to decide. The jury's merely making some advisory factual
3 findings which the Court can consider in making its own ruling
4 on the legal question presented by the declaratory judgment
5 action.

6 THE COURT: Anything else with regard to 21, Burden
7 of Proof?

8 MS. FRICK: No, Your Honor. We would agree. We
9 think that it's standard.

10 THE COURT: The next objection?

11 MR. OWENS: Your Honor, this isn't an objection but
12 with respect to page 22, it will need to be amended to just
13 the -- to note the issue that we had raised with respect to
14 the destruction of evidence claim.

15 THE COURT: All right. Well, I'm assuming -- okay,
16 fine. Thank you for the notation about that.

17 MR. OWENS: With respect to plaintiff's next
18 objection, Your Honor, there is, as it relates to the
19 compensatory damages instruction on page 30 --

20 THE COURT: Okay. Let me do this then: If your
21 next objection is on page 30, are there any other objections
22 prior to page 30?

23 MR. McLANDRICH: Yes, Your Honor.

24 THE COURT: All right.

25 MR. McLANDRICH: With respect to page 25, the

1 instruction with respect to suggestive identification, we
2 object to there being no indication to the jury, as we had
3 indicated in our red line to the Court, that they are not
4 being instructed noting that there are certain allegations
5 with respect to the photo array that courts within the circuit
6 as recently as the last few years have found are not, in and
7 of themselves, sufficient to make the photo array unduly or
8 unnecessarily suggestive.

9 And we think it gives the jury insufficient direction and
10 an incorrect impression that the mere fact that the background
11 color, for instance, of one of the photographs is different
12 can be a basis for finding the array unduly suggestive when
13 the circuit has made it clear that such is not the case. And
14 that was just illustrative of the issues we had raised in our
15 red line. And so to preserve a potential error, we would
16 assert that.

17 The issues that we raised in our red line we believe
18 should be offered to the jury as appropriate instructions and
19 would, if you will, tender the red line as necessary to
20 preserve the errors. I know I have to proffer the proper
21 instruction that we would request to preserve the error, and
22 so we would proffer that, if you will.

23 THE COURT: All right. Counsel, anything?

24 MR. OWENS: Just on behalf of plaintiff, we, of
25 course, disagree. The Court's instruction states the correct

1 test, which is the totality of the circumstances, and it's
2 proper to not include instructions that would weigh -- direct
3 the jury to find a directed verdict for Defendant Moore.

4 THE COURT: Had you filed that proposed instruction?

5 MR. McLANDRICH: Well, the way the instructions were
6 provided, the plaintiff provided the initial draft. We
7 provided our comments by red line. So our submission would be
8 in the red line. If we need to do it in a more formal
9 fashion, you know, we'll be happy to do that to make sure that
10 we have a proper proffer.

11 MR. MAYER: I understand what you're saying. My
12 understanding was that the defendant had also filed on the
13 CM/ECF system a copy of his proposed jury instructions which
14 would have incorporated, essentially, the defendant's red
15 lines, such that I believe that the record would already
16 reflect that. I'm not 100 percent sure, but I believe that
17 that is the case --

18 MR. OWENS: That's correct.

19 MR. MAYER: -- if that ends up averting to having to
20 file the red lines.

21 MR. McLANDRICH: You may well be right. The brain's
22 getting a little soft at this point. And, yes, I see that we
23 did file --

24 THE COURT: And that's what you are -- that's your
25 proposal then?

1 MR. McLANDRICH: Yes, Your Honor.

2 THE COURT: Which was your proposal before, right?

3 MR. McLANDRICH: Yes, Your Honor.

4 THE COURT: All right.

5 MR. McLANDRICH: And before we get to 31, also with
6 respect to the next instruction, the Suppression of Material
7 Evidence instruction, we see where the Court has chosen the --
8 I'm sorry. Actually, I'm back still in this Suggestive
9 Identification instruction.

10 Where the Court has chosen the word "unnecessarily
11 suggestive" and, you know, having reviewed the matter, I see
12 where courts have used "unnecessarily" and also used "unduly."
13 Some courts have chosen to use both. I think that there's a
14 different connotation to "unnecessarily" than "unduly," and I
15 would request the Court put it in the alternative, if you
16 will, of "unnecessarily or unduly suggestive" to cure that
17 issue. Thank you.

18 THE COURT: Anything?

19 Okay. Moving on to what, 31? Anything before 31?
20 Counsel.

21 MR. OWENS: So there's -- as it relates to
22 compensatory damages, there was two things removed since the
23 version we saw this morning.

24 THE COURT: Now you're referring to what
25 instruction?

1 MR. OWENS: The Compensatory Damage Instruction on
2 page 30, I guess. I apologize, Your Honor.

3 THE COURT: All right.

4 MR. OWENS: There was two things deleted, "the
5 reasonable value of necessary medical care, treatment, and
6 services rendered," "the wages and earnings plaintiff lost."
7 So those we would ask to be re-inserted into the instruction.

8 And I don't know if there was potentially some confusion.
9 In a prior iteration, we had agreed, based upon the
10 defendant's objections and discussion amongst counsel, to
11 remove consideration of future wages and things like that.
12 But not -- but we did not intend to --

13 THE COURT: The Court understands that.

14 Anything?

15 MR. McLANDRICH: Your Honor, I think that the
16 modification is appropriate. I don't believe that there was
17 evidence offered that would have justified inclusion of the
18 two lines that were omitted.

19 THE COURT: Next objection?

20 MR. McLANDRICH: You know, I think that my next
21 objection would be with respect to -- I'm sorry. Let me
22 consider one moment longer.

23 No, Your Honor.

24 MR. OWENS: Am I supposed to be up?

25 THE COURT: Yes.

1 MR. OWENS: Oh, I apologize.

2 MR. McLANDRICH: He was looking. I don't think he
3 came up with one yet.

4 MR. OWENS: Thank you, Judge. I think that we've
5 indicated plaintiff's objections.

6 THE COURT: Oh, that's it?

7 MR. OWENS: That's it.

8 THE COURT: There you go.

9 MS. FRICK: Are you looking at me now, Your Honor?
10 Are you looking at him or are you looking at me? I can't
11 tell.

12 THE COURT: I'm looking at both of you.

13 MS. FRICK: Are we just talking instructions or are
14 we talking the verdict form, as well?

15 THE COURT: Well, we are just talking instructions
16 right now. It shouldn't be too long, I don't think, till we
17 get to verdicts.

18 MR. McLANDRICH: No further objections, Your Honor.

19 THE COURT: On the instructions?

20 MR. McLANDRICH: Yes, sir.

21 MS. FRICK: Your Honor, although I think it's been
22 somewhat clarified in the language that was added, I just am
23 going to make a general objection to the Mental State
24 instruction on page 29, as I believe it may cause confusion in
25 the jury with respect to our claim.

1 THE COURT: All right. You're objecting to the
2 entire instruction?

3 MS. FRICK: The inclusion of the instruction, yes.

4 MR. OWENS: We'll stand by the copious authorities
5 that we cited.

6 THE COURT: All right. Are there any other
7 objections now as to any of the instructions?

8 We'll move to verdict forms if you want to comment on
9 those, if you need to. Any?

10 And, of course, those will have to be modified. Even
11 though being modified, are there any objections to the jury
12 instructions from plaintiff?

13 MR. OWENS: No additional objections, Your Honor.

14 MR. McLANDRICH: Just sort of a question, I suppose,
15 more than an objection. In the verdict form, we have the
16 instruction Part III with respect to the intervenor claim.
17 And they are asked to find with respect to whether Officer
18 Moore was acting manifestly outside the scope of his
19 employment; and then in the next question, asked to find
20 whether he was not acting within the course of -- within the
21 scope of his employment.

22 I just don't know that there is anywhere where the jury's
23 given any guidance into manifestly to make that distinction
24 between "scope of employment" and manifestly outside the scope
25 of his employment. So not so much an objection as a question

1 with respect to guidance on that issue for the jury.

2 MS. FRICK: Your Honor, I believe that the jury
3 instruction that's included regarding our claim at the very
4 last line does define what's meant by "manifestly" in order
5 to, I think, clarify that. And because of the differences
6 between the defending and indemnification, I think you have to
7 have them both.

8 MR. McLANDRICH: I do too. And I see it now, so I'm
9 satisfied.

10 THE COURT: Now, counsel for Township, you had an
11 objection?

12 MS. FRICK: Just generally, again with respect to
13 Part III, it would be our position that it need not be broken
14 down by claim but that just by generally if any act was not
15 acting in good faith, and then each of the three, but just as
16 a general matter. Because I believe -- if they find that any
17 act was in bad faith or outside of the scope of his employment
18 or official duties, that that -- that you can't separate out
19 what that -- what damage that would have caused and,
20 therefore, I think eventually that could cause more problems
21 when ultimately if there is a determination to be made on
22 indemnification.

23 THE COURT: That goes along with the same discussion
24 you had on damages and things such as that.

25 MR. OWENS: Just to the extent that we are allowed

1 on behalf of plaintiff, I think the inference goes the
2 opposite direction. You know, if the jury found -- say that
3 there were two different claims and the jury found that one of
4 them was within the scope of employment and not in bad faith
5 or whatever the language is, it wouldn't be relevant that some
6 other act was outside the scope of employment. Because as the
7 Township pointed out in its brief with respect to the double
8 recovery issues, that there should be a single line with
9 respect to damages because the damage is the same. So it
10 would actually be irrelevant if there were one other act for
11 which Mr. Moore were liable that was not in good faith. So I
12 think they have it backwards.

13 MS. FRICK: I'm not sure I --

14 THE COURT: I didn't either. I didn't get it.

15 MR. McLANDRICH: I think that -- if I could. I
16 think that given now that damages aren't being found
17 separately on each claim, that there probably doesn't need to
18 be separate finding on the intervention indemnity issue by
19 claim because, you know, at this point we won't know what
20 damages are attributable. So I sort of agree with Dawn in the
21 sense that if any of the acts are outside the course and
22 scope, then it's going to apply, as far as we know, to all the
23 damages that are found; or if it's in bad faith, as far as we
24 know, it will apply to all the damages.

25 THE COURT: I am not quite sure what plaintiffs --

1 well, you can have your own concerns if you want to. I'm not
2 sure what that concern is.

3 MR. OWENS: I think the concern -- and maybe I'm
4 not articulating -- well, actually, I know I'm not
5 articulating it well -- is that if there were sort of two
6 acts, right, and one were -- he was found liable on and one he
7 was not, and then the jury need only find that one of the
8 actions was within the scope of employment in order to find
9 that -- to find the factual predicate for indemnification.
10 It's not the fact that one bad act, so that would necessarily
11 take you outside the scope of employment, if there were other
12 acts, for example, that were within the scope of employment.

13 I understood the Township to be saying -- and maybe I
14 misunderstood the Township as saying -- you've got a whole
15 bunch of acts here, call it ten acts. If you find that one of
16 those acts was outside -- was in bad faith or something, then
17 there is no duty to defend. I don't think that that's
18 necessarily true. That's what I was trying to address.

19 THE COURT: All right. We'll look at it. We'll
20 look at it.

21 MR. OWENS: Thank you, Judge.

22 MR. McLANDRICH: Thank you, Your Honor.

23 MS. FRICK: Thank you, Your Honor.

24 THE COURT: Anything else?

25 MR. OWENS: No.

1 MR. McLANDRICH: No, sir.

2 MS. FRICK: No, Your Honor.

3 MR. HERMAN: No.

4 THE COURT: When was the last time you were in a
5 fire drill, counsel?

6 MR. OWENS: Actually, Your Honor, I do have one
7 question. I apologize. I guess I just wanted to say, wanted
8 to have an understanding of what the Court was anticipating us
9 being allowed to say about why the Township is here. I know
10 in openings there was, you know -- it's sort of they got a
11 legal claim that was not as it related to our claims. That's
12 not the same. But I assume the Court doesn't -- wouldn't
13 permit any argument more beyond that; is that right?

14 THE COURT: Right.

15 MR. McLANDRICH: Your Honor, one other issue on the
16 instructions. We will have to insert the stipulation that
17 we've talked about previously with respect to the photo
18 arrays, and we'll have to, you know, draft something to submit
19 so that it can be added to the stipulations with respect to
20 the stipulation being that the photographs -- the position of
21 the photographs within the array may not represent what they
22 were back in the day, and that Detective Moore believes that
23 the black and white versions represent the position of the
24 photos at the time.

25 THE COURT: Right. My understanding, I thought you

1 were saying it didn't have to be in the final instructions.

2 MR. OWENS: I thought you told us to sort it out.

3 THE COURT: How quickly were you going to have that?

4 MR. McLANDRICH: I think we could, you know, do it
5 as we sit here. I just wanted to -- before we close the
6 record on instructions, I remembered it. So I wanted to --

7 THE COURT: All right. If you can draft it, we'll
8 try to get it concluded.

9 MR. McLANDRICH: Thank you, Your Honor.

10 THE COURT: Anything else?

11 MR. McLANDRICH: No, sir.

12 THE COURT: I am hoping that we can get through
13 closing arguments right off the bat tomorrow morning, followed
14 by instructions, and get these folks out and start
15 deliberating at least tomorrow. I'm trying to think. It's
16 been about five days of evidence. I'm just trying to figure
17 out how long I'm going to let you talk.

18 Any thoughts? And that's all they are really, thoughts.

19 MR. OWENS: We're at your leisure. I think -- I
20 know we'd like to get the jury deliberating soon and don't
21 want to tarry too long.

22 I guess one practice thing, since you brought it up while
23 it's on my mind, does the Court have any rules against
24 splitting the argument?

25 THE COURT: Yes, you can if you want to. But what I

1 will do, though, is I will hold you to your time. I've been
2 burnt too many times. I will hold you to my time. And so,
3 for example, you, whoever gives your opening, if you want a
4 certain amount of time, about ten minutes before that's up, I
5 will let you know that.

6 MR. OWENS: Sure.

7 THE COURT: And then we'll stop right at that point
8 in time. So the timeline -- the time allocation I give you is
9 the same time allocation I give to defendant, but you can
10 split yours. The defendant's all going to get the same time.

11 Now, as to the -- I haven't thought about the Township.
12 But I will.

13 THE COURTROOM DEPUTY: All rise. This court stands
14 in recess.

15 (Court adjourned at 5:26 p.m.)
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CERTIFICATE OF REPORTER

I, Mary A. Schweinhagen, Federal Official Realtime Court Reporter, in and for the United States District Court for the Southern District of Ohio, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

s/Mary A. Schweinhagen

_____ 21st of December, 2023

MARY A. SCHWEINHAGEN, RDR, CRR
FEDERAL OFFICIAL COURT REPORTER